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Richardson Dilworth

Samuel Dash

A WIRE TAP PROPOSAL

By

RICHARDSON DILWORTH*

AND

SAMUEL DASH**

The wire tap issue must soon come to a head. Bills in Congress, resolutions by bar association committees and general debate are serving to sift and resift arguments pro and con. The result will be legislation, federal and state, restricting wire tapping. No responsible person advocates that wire tapping be permitted without restrictions. Except for the New York constitutional and statutory provisions of 1938, there are no satisfactory restrictions on wire tapping today. Section 605 of the *Federal Communications Act,* as interpreted by the Department of Justice, permits wholesale wire tapping. It prohibits wire tapping only in conjunction with divulgence. That is fine for the police, since law enforcement officers do not consider the virtue of wire tapping to be procurement of evidence for court, but rather its usefulness in crime detection. Therefore, federal police wire tap daily without restriction or limitation outside that afforded by the Department of Justice itself.

We should, therefore, expect the forthcoming legislation to place restrictions on wire tapping. The basic question is whether these restrictions should take the form of a total outlaw or a partial outlaw permitting a limited area of wire tapping by law enforcement officers for certain crimes under rigid supervision. The latter course appears to be more sensible, since it is an attempt to meet realistically the problem and resolve it. Total outlaw is simply a default and surrender to a fear of wire tap abuse.

Any legislation permitting a restricted form of wire tapping must start with a prohibition against wire tapping by persons other than law enforcement officers. It is in this area of wire tapping, the wire tapping by the private detective, the blackmailer, etc., that the practice is vicious and indefensible. There is no doubt that this kind of wire tapping must be prohibited and its practice punished as a crime.

The use of wire tapping by police and district attorneys should certainly not be unrestricted. Power of this kind requires supervision, and such supervision has traditionally been placed in the courts. But, there can be no justification for a total prohibition against wire tapping by law enforcement officers. Wire tapping is an effective weapon against criminal activity. Of course, effectiveness is not the sole consideration. If wire tapping in and of itself were unfair, coercive or likely to produce untrustworthy evidence, then it would be a kind of weapon incompatible with American principles. Such effective weapons as the rack, screw and the coercing of

*District Attorney of Philadelphia.
**First Assistant District Attorney of Philadelphia.

a confession are rightly outlawed for this reason. But wire tapping is not an unfair or coercive procedure. It does not tend to produce the conviction of innocent people. Rather, it tends to insure the conviction of guilty people. It is an "ear witness" of crime—almost, if not as good as, an eye witness.

The opponents of any form of wire tapping concede that it is an effective method of crime detection. They concede that in so far as the determination of the guilt or innocence of the defendant is concerned, it is accurate and is not an unfair procedure. But, they would still outlaw wire tapping because (a) it permits the interception of innocent conversation; (b) it is dirty business; and (c) it is an invasion of privacy.

The fallacy of this position is that it treats these three "invasions" as absolutes, when throughout the entire constitutional history of this country the effort has been to balance the right of the individual against the need for public security. As indicated above, in the case of certain coercive and unfair, though effective, police methods, protection of the individual has required complete prohibition of those police methods. But, in the case of every other type of criminal law enforcement procedure, a balance has been drawn between the right of the individual and public security. Every objection raised against any form of wire tapping can just as easily be made against many other police tactics which are accepted today and considered proper and essential to effective law enforcement and crime prevention. There are, for instance, the police informer, the eavesdropper, the installation of recording devices on walls adjoining a man's hotel or office, authorized search and seizure, the police spy, fingerprinting and photographing, blood testing, etc. All of these are basic invasions of privacy. All of these are essentially "dirty business", and in many of these, the conversations or activities of innocent persons are incidentally overheard or observed.

Actually wire tapping is not incompatible at all with our traditional way of doing things in this country. We have been doing something like it since colonial days. We are, of course, speaking of lawful search and seizure.[1] The outcry against wire tapping is indeed surprising when one considers the general acceptance of search and seizure. From the very beginning of our constitutional history the most sacred concept we have had is the sanctity of the home. Yet there has never been any doubt that under certain conditions a law enforcement officer with a warrant, and in some situations without a warrant, may invade the home, search the most private nooks and crannies and carry away the items belonging to the householder. Such a search and seizure may be conducted in secret without the householder being present. No greater invasion of privacy can be imagined. Certainly going through a person's home, searching his drawers, going through his effects and seizing his

1 The Supreme Court of the United States has held that wire tapping does not constitute a search and seizure within the Fourth Amendment. Olmstead v. United States, 277 U.S. 438, 48 Sup. Ct. 564, 72 L. Ed. 944 (1928). This 5-4 decision was based on a literal reading of the Fourth Amendment which refers only to tangible things and not telephonic communications. For the purpose of analysis and in the formulation of regulations for wire tapping, however, the spirit, history and regulation of search and seizure are directly applicable and analagous.

property is "dirty business". Also, reasonable searches of homes have often revealed innocent but embarrassing information concerning persons other than the householder. No one has suggested abloshing the right of search for this reason.

It must, of course, be conceded that the basic nature of wire tapping presents a risk of invasion of privacy of a greater degree than search and seizure. It would seem, however, that the answer is not to abolish wire tapping, but to impose more stringent restrictions on wire tapping than are now imposed on search and seizure. Can this be effectively done? We believe it can. Those who say it cannot make the following arguments. In the first place, they say that any restrictions placed on wire tapping, such as requiring that a warrant be issued by a judge, will not be enforced and that judges will rubber stamp police requests. This is a shocking argument, for it applies equally well to the warrant provisions for search and seizure, for arrests and for every other type of law enforcement activity requiring judicial supervision. The argument in effect says that judges will not do their duty. If that is true, we have something much more serious to worry about than wire tapping. In dealing with problems of this sort, we must assume that judges and law enforcement officers will obey the law. If they will not, then any legislation outlawing wire tapping will not be effective, since it will be these same judges and the same law enforcement officers who will interpret and apply the law. The remedy for individual abuse is criminal prosecution, impeachment and action at the polls, and not strangulation of judicial and prosecution functions.

Second, the proponents of wire tap outlaw say that warrant procedures in wire tapping cannot afford the safeguard that they do in search and seizure, since there will be no notice to the persons involved and no record in the court issuing the warrant. This argument assumes that notice is essential in search and seizure. Searches of homes may be conducted in secret, and the house owner may never know he was the subject of search.[2] There are no statutory provisions in Pennsylvania requiring an officer executing a warrant to search only when the householder or anybody else is present in the house, to leave a receipt or copy of the warrant in the house or in any way to give notice to the party involved that the house has been searched.[3] There are, however, provisions in Pennsylvania for the making of a return and of an inventory of the things seized to the court issuing the warrant.[4] Similar procedure of return and disclosure can certainly be included in a statute

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2 Notice requirements are purely statutory. Cornelius, Search and Seizure, § 216, p. 517 (2nd Ed. 1930). Some states require the searching officer to leave a receipt or a copy of the warrant in the house. But failure to comply with such provisions has been held to not invalidate the search. Ibid. The federal courts have similarly ruled with regard to the "Epionage Act of 1918" which contains a notice requirement. Nordelli v. United States, 24 F.2d 665 (C.A. 9th, 1928); Giacolone v. United States, 13 F.2d 108 (C.A. 9th, 1926); Rose v. United States, 274 Fed. 245 (C.A. 6th, 1921); United States v. Gaitan, 4 F.2d 848 (S.D. Cal., 1925); United States v. Kaplan, 286 Fed. 963 (S.D. Ga., 1923).

3 The Liquor Act of 1923, March 27, P.L. 34, did have a provision, § 9, requiring an officer making a seizure to leave a copy of an inventory of the goods seized with the person from whom they were seized. This section was held to be ministerial, and a violation of it did not vitiate the search. Commonwealth v. Schwanda, 19 North 37, 71 Pitts. 529 (1923). This section was later repealed.

4 Act of 1860, March 31, P.L. 382, § 60, 18 P.S. 1445.

regulating wire tapping. Such a provision is included in a proposed statute appended to this article. Further, this proposed statute provides that the application for the warrant or warrants should be a matter of record in the court issuing the warrant. But, for obvious reasons, it is also provided that the application be impounded and not become a part of the public record of the court during the period of time the warrant is in force. An added protective provision authorizes the court to order the destruction of all material containing the recordings or transcripts of recording of intercepted communications where they reveal no evidence of crime, and, even where they reveal some evidence of crime, the destruction of those portions of these materials not relating to criminal conduct.

A third argument against wire tapping of any kind is that wire tapping cannot be compared to lawful search and seizure since wire tapping is essentially a search for evidence, and no lawful warrant may issue to search for evidence in traditional search and seizure cases. This has been the federal law.[5] It was first expressed in *Boyd v. United States.*[6] This decision was based on the privilege against self-incrimination. The court held that a search for evidence compels the person subject to the search to give evidence against himself. This interpretation of the Fifth Amendment to the Federal Constitution by the Supreme Court of the United States is consistent with that Court's ruling concerning the admissibility of illegally seized evidence. For in that situation too, the Court has stated as one of its reasons for prohibiting illegally seized evidence from being admitted in court that the admission of such evidence would be compelling the party involved to give evidence against himself.[7]

Pennsylvania[8] and the majority of American states[9] have rejected this federal interpretation of the privilege against self-incrimination. Pennsylvania and these states apply the common law rule that illegally seized evidence is admissible and restrict the privilege against self-incrimination to testimonial compulsion. This interpretation is also vigorously expressed by Professor Wigmore.[10] Therefore, since Pennsylvania does not consider a search for evidence a violation of the privilege against self-incrimination, there appears to be no good reason why Pennsylvania should follow the federal rule prohibiting searches for evidence.

It is interesting to note that in *Boyd v. United States, supra,* it was unnecessary for the Supreme Court to express the rule it did. In that case, the question before the Court was the legality of the compelling of a person to produce certain papers in court. This was in no way a search and seizure and clearly involved a violation of the privilege against self-incrimination. This was recognized by Mr. Justice

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5 This rule would prohibit a search by warrant for a diary containing a complete confession by the writer of a murder he committeed.

6 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1885).

7 Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647 (1920).

8 Commonwealth v. Dabbierio, 290 Pa. 174, 138 Atl. 679 (1927); Commonwealth v. Montanero, 173 Pa. Super. 137, 96 A.2d 171 (1953).

9 See tables in Wolf v. Colorado, 338 U. S. 25, 69 Sup. Ct. 1359, 93 L. Ed 1782 (1948).

10 Wigmore, Evidence, § 2183 (3rd Ed.).

Miller and Chief Justice Waite who filed a concurring opinion pointing out that the violation of the privilege against self-incrimination was compelling the production of books and papers in court, and not an unreasonable search and seizure. Mr. Justice Miller stated at page 641:

> "While the framers of the constitution had their attention drawn, no doubt, to the abuse of this power of searching private houses and seizing private papers, as practiced in England, it is obvious that they only intended to restrain the abuse *while they did not abolish the power.* Hence, it is only *unreasonable* searches and seizures that are forbidden, and the means of securing this protection was by abolishing searches under warrants, which were called general warrants because they authorized searches in any place for anything. This was forbidden, while searches founded on affidavits, and made under warrants which described the thing to be searched for, the person or place to be searched, are still permitted. I cannot conceive how a statute aptly framed to require the production of evidence in a suit by mere service of notice on the party, who has the evidence in his possession, can be held to authorize an unreasonable search or seizure, when no seizure is authorized or permitted by the statute." [Emphasis partly added.]

Annenberg v. Roberts[11] and *American Car and Foundry Co. v. Alexandria Water Co.*[12] have at times been cited for the rule prohibiting searches for evidence. These cases stand for no such rule. They dealt with a situation similar to that in the *Boyd* case, involving the compelling of a person to produce his books and papers. The Supreme Court of Pennsylvania held that an order so broad, without particularly describing books and papers germane to the inquiry, was invalid.

Thus, a real and applicable analogy can be made between wire tapping and search and seizure. Since this is true, wire tapping need not be a strange and odious activity. It can be controlled and made to serve the best interests of the community. Though the effectiveness of wire tapping has been assumed in this article, it should not go unemphasized.

The telephone is an essential medium for the conduct of organized crime. Organized and vicious rackets and criminal syndicates use the phone every day. This is particularly true in operations conducted in large cities and in inter-city and inter state criminal activities. They could not organize or operate their syndicates without the telephone. The conspiracies and activities of crime syndicates reach into the very chambers of judges, legislators and government executives. To relax in any way the fight against such activities is to endanger the existence of democratic government. Wire taps on leading Philadelphia racketeers have revealed conversations implicating police, magistrates and legislators. Without wire tapping these connections between crime and government would remain unknown and unprovable. One need not elaborate to demonstrate the similar effectiveness of wire tapping in combating kidnapping, extortion and treason. It is indeed ridiculous

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11 333 Pa. 203, 2 A.2d 612 (1938).
12 221 Pa. 529, 70 Atl. 867 (1908).

to prevent the district attorney or the head of a police department, under proper supervision, to listen in on those who are in the act of destroying honest government, endangering human life or jeopardizing the safety of the nation.

We believe that effective safeguards are set up in the proposed statute we append to this article. Recognizing the special dangers involved in wire tapping, we propose that only the district attorney or the head of the police department should be permitted to apply for a warrant to wire tap. Also, only a judge of the court of oyer and terminer or quarter sessions should be authorized to issue such a warrant. The warrant should issue only on probable cause being shown that a real and immediate danger exists as to human life, the public welfare or the national security, and that there is no other effective means of obtaining this evidence. The warrant should be good only for a limited period of time, say thirty days, at the end of which time the law enforcement officer should be required to make a return to the court revealing what he has learned. The warrant should not be renewed unless the information revealed in the return justifies the renewal. The judge should also be able to order the destruction of wire tap evidence where the return does not produce evidence of crime. Even where the return does produce evidence of crime, the judge should be able to order destruction of those portions of the wire tap evidence unrelated to criminal contact. Finally, the application for a wire tap warrant should be made a part of the record of the court.

New York has similar provisions authorizing wire tapping adopted by its legislature in 1938, after a constitutional amendment. The provisions in our appended statute are even more stringent than those now in existence in New York. For instance, in New York any police officer above the rank of sergeant may apply for a warrant. Also in New York the warrant is good for a period of six months. In New York, there is no requirement for a return to be made to the judge issuing the warrant. There is no provision for the destruction of wire tap evidence and no provision making the application of the warrant a part of the record of the court. Although there has been some dispute over the merits of the New York law, it is significant that the law has not been legislatively or judicially attacked since its enactment in 1938. Further, the Chief Assistant District Attorney of New York reports that the wire tap authorization statute has not only been effective in New York, but that the enforcement of laws concerning major crimes would have been almost impossible without it. He vigorously denies that law enforcement officials abused the wire tap privilege. He points out that about seventy applications for wire tap warrants are made a year and not all of these are granted. A significant by-product of the New York law has been the prosecution of persons who engaged in unauthorized wire tapping. The district attorney appreciates that his own privilege is secure only so long as the public is satisfied that wire tapping is being properly restricted and supervised. Apparently, New York is the only place one finds prosecution of unauthorized wire tapping. Under the federal outlaw of wire tapping, there has only been one prosecution since its enactment in 1934. The reason for this is that the Justice Department and the Federal Bureau of Investi-

gation make constant use of wire tapping, and so in good conscience, they cannot prosecute others for breaking the law they themselves are violating every day in the year.

A Proposed Statute

An Act to Prohibit Unauthorized Interception, Divulgence or Use of Telephone and Telegraph Communications Without Warrant; to Define Conditions under Which an Interception Warrant May Issue, and to Set up Certain Safeguard Procedures with Respect to Interception by Warrant: Providing Criminal Penalties and Civil Damages, Including Attorneys' Fees, for the Violation Thereof.

Section 1: Except as provided in Section 2 of this Act, no person shall intercept a communication by telephone or telegraph without permission of one of the parties to such communication. No person shall install or employ any device for overhearing or recording communications passing through a telephone or telegraph line with intent to intercept a communication in violation of this act. No person shall divulge or use the contents or purport of a communication intercepted in violation of this act. Whoever wilfully violates or aids, abets or procures a violation of this act is guilty of a misdemeanor and shall be punishable by imprisonment of not more than one year or by fine of not more than $5,000. or both, and shall be liable to any person whose communication is unlawfully intercepted or divulged for treble the amount of any damage resulting from such unlawful interception, divulgence or use, but in no event less than $100.00 and a reasonable attorney's fee. The term 'person' includes natural persons, business associations, partnerships, corporations or other legal entities, and persons acting or purporting to act for or in behalf of any government or subdivision thereof, whether federal, state or local. The term 'divulge' includes divulgence to a fellow employee or official in government or private enterprise, but does not include the testimony in judicial or other lawful proceedings of witnesses appearing under subpoena.

Section 2: Any judge of the court of Quarter Sessions or Oyer and Terminer may issue a warrant authorizing the interception of communications by telephone or telegraph upon application subscribed and sworn to by the attorney general, the district atorney or the head of the police department, setting forth facts establishing probable cause that the interception will reveal evidence of the commission of a crime constituting a real and immediate threat to human life, to the public welfare, or to our national security, describing as nearly as may be the person or persons whose communications are to be intercepted, and identifying the particular line or means of communication. The application shall also contain the allegation that there are no other feasible means of obtaining the evidence, and the judge shall inquire into the basis of this allegation and issue the warrant only where he is satisfied that the allegation is meritorious.

Section 2 (a): Such warrant shall be valid for a period not exceeding thirty days. At the end of this period the person to whom the warrant has been issued

shall return the warrant to the judge who issued it and make full disclosure of all of the information obtained under the warrant. The judge may in his discretion renew the warrant for an additional sixty days, if so requested by the officer originally applying for the warrant, where the information obtained under the warrant constitutes substantial evidence of the commission of a crime of the kind for which a warrant may originally issue, and further interception is necessary to complete the investigation.

Section 2 (b): When the information obtained under the warrant does not reveal evidence of crime, the judge may order the destruction of all transcripts, tapes, or other material containing the recording of intercepted communications. Where the information obtained under the warrant does reveal evidence of crime, the judge may order the destruction of those portions of the transcripts, tapes, or other material containing the records of intercepted communications which are not related to the criminal conduct or activity.

Section 2 (c): The application for an interception warrant shall be a matter of record in the court to which it is made. Such application, however, shall be impounded and not made part of the public record of the court during the period for which the warrant has been issued, and during any additional period authorized by the court where a request for a renewal of the warrant has been made and granted.