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# COURT-ORDERED WIRETAPPING: AN EXPERIMENT IN ILLINOIS

MARVIN E. ASPEN\*

## INTRODUCTION

**A**T THE Seventy-fourth General Assembly of the Illinois Legislature, a model court-ordered wiretapping bill was introduced. This bill was drafted by Chicago Mayor Richard J. Daley's Committee on Organized Crime Legislation. It was passed by the House and was reported out of the Senate with a "do pass" recommendation. On June 30, 1965, the Illinois Senate defeated the bill on a close 27 to 22 vote. This article is an attempt to analyze the need for the proposed court-ordered wiretapping bill and to answer some of the criticisms against the adoption of such a bill.

Generally, there are three different viewpoints as to proposed court-ordered wiretapping. One group of individuals favors unfettered court-ordered wiretapping and looks with disfavor upon any legislative safeguards aimed at insuring against possible police abuse and the deprivation of civil liberties of innocent persons.

A second group is made up of those persons dedicated to defeating the adoption of any form of court-ordered wiretapping. These persons base their objections primarily upon imagined potential abuses which they are unable definitively to articulate. They also challenge the need for legalized wiretapping, the constitutionality of any such procedure, and insist that this type of legislation will destroy the backbone of our free society. They argue all this in spite of the mounting evidence to the contrary of each of these propositions.

This article is not addressed to either of these groups. Both of these extreme positions are based more upon emotion than upon reason. Persons endorsing them are unable to make an intelligent and honest appraisal of both the need for legalized wiretapping and the further need

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to assure that such procedures do not violate the liberties of any individual. This article will not change the views of those persons committed to either of these positions. Fortunately, these two pole positions are in the minority.

A third group of persons interested in this important issue have not taken a rigid position as to the proposed legislation. This group includes those persons who are leaning either toward or against the adoption of court-ordered wiretapping with proper protective measures, but they are not so committed that sound reason will fail to influence them. It is to this latter group of uncommitted individuals that this article is directed.

There are three primary issues regarding court-ordered wiretapping in Illinois: first, is there a legitimate need for court supervised wiretapping; secondly, can a bill be drafted satisfying this need which will at the same time safeguard the rights of the individual; and finally, will such a bill be constitutional.

#### CONSTITUTIONALITY

The constitutionality of a particular piece of legislation is solely a judicial determination. Many opponents of proposed court-ordered wiretapping hide behind the argument that any statute drawn would be unconstitutional.

Certainly, a bill which is obviously an unconstitutional one should not be proposed to any legislative body. However, where it is not clear that a proposed bill is unconstitutional, it seems improper for detractors of such legislation to hypothesize as to what a reviewing court might say about its constitutionality when there are no clear indications that the legislation does, in fact, violate constitutional principles. It seems less than honest for those individuals who are opposed on principle to court-ordered wiretapping to hide behind a specious and strained constitutional argument.

The so-called constitutional argument against the proposed legislation runs something like this. Section 605 of the Federal Communications Act provides in part that "[n]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, affect, or meaning of such intercepted communications to any person."<sup>1</sup> This statute has been construed by the United States Supreme Court to mean that

<sup>1</sup> 47 U.S.C. § 605.

wiretapped recordings may not be used in federal courts. Opponents of court-ordered wiretapping argue that section 605 also prohibits the use of such evidence in state courts and the adoption of any statute authorizing such use. The courts, however, do not support this contention.

The United States Supreme Court has held that wiretapping does not constitute a fourth amendment search or seizure.<sup>2</sup> Any statute purporting to authorize a violation of the fourth amendment would, of course, be unconstitutional. However, the federal provision against wiretapping is not a constitutional, but rather a statutory one. For that reason, section 605 is applicable to the federal jurisdiction but not to the state.

The United States Supreme Court has explicitly stated that “[s]ection 605 applies only to the exclusion in federal court proceedings of evidence obtained and sought to be divulged in violation thereof; it does not exclude such evidence in state court proceedings.”<sup>3</sup> Again in 1961, the United States Supreme Court affirmed the dismissal by a federal district court of a complaint seeking to enjoin New York State officials from proceeding on indictments based upon wiretap evidence obtained pursuant to the New York statute.<sup>4</sup>

It is fair for the proponents of court-ordered wiretapping to rely on these cases. The United States Supreme Court, in its recent decisions, has done nothing to overrule the language and the effect of these cases.

It is also argued that the passage of section 605 by Congress precludes the state from adopting a court-ordered wiretapping bill, in that a prohibition of a federal statute may not be set to naught by state statute. However, this federal “supremacy” or “pre-emption” principle is usually applied to federal laws derived expressly from the United States Constitution.<sup>5</sup> As has been shown, the United States Supreme Court has decided that section 605 is not a derivative of any fourth amendment prohibition. The United States Supreme Court has had ample opportunity to preclude the States from adopting and utilizing wiretapping statutes. It has not availed itself of this opportunity.

In any event where a state statute can be construed as not directly

<sup>2</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>3</sup> *Schwartz v. Texas*, 344 U.S. 199, 203 (1952).

<sup>4</sup> *Pugach v. Dollinger*, 365 U.S. 458 (1961).

<sup>5</sup> *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1939).

contravening a federal law, the state law may stand even though the federal law concerns the same general area of activity.<sup>6</sup> Section 605 precludes *intercepting and divulging*. May not a state law be construed to allow the interception, but not divulging of telephone conversations; and thus not be in conflict with section 605? May not the court-ordered wiretapping bill be restricted to intra-state telephone conversations, as opposed to inter-state conversations?

In all fairness, a more satisfactory answer to the "supremacy" argument would be the amendment of section 605 expressly to permit a State to adopt a court-ordered wiretapping bill. There is a current movement in Washington aimed at accomplishing this.<sup>7</sup>

#### THE NEED

The next issue is the need for the proposed bill. The evidence is overwhelming that court-ordered wiretapping is an invaluable tool in getting at heretofore insulated "king-pins" of organized crime.

In Illinois, Superintendent of the Chicago Police Department Orlando W. Wilson, United States Attorney for the Northern District of Illinois Edward Hanrahan, Cook County Sheriff Richard Ogilvie, Cook County State's Attorney Daniel P. Ward, and Director of the Illinois Crime Investigating Commission Charles Siragusa have all endorsed the need for this measure in the war against organized crime. These people are fair minded, competent persons whose professional opinion is highly respected.

Proponents of this type of legislation outside of Illinois have advocated court-ordered wiretapping legislation.

On May 10, 1962, New York County District Attorney Frank S. Hogan told the Judiciary Committee of the United States Senate that, in his opinion, "telephonic interception, pursuant to court order, is the single most valuable weapon in law enforcement's fight against organized crime."<sup>8</sup> Hogan has valiantly fought organized crime for twenty-nine years. He knows whereof he speaks. Hogan states further that "without court ordered wiretapping his office could not have convicted Charles 'Lucky' Luciano, Jimmy Hines, Louis 'Lepke'

<sup>6</sup> *People ex rel. McLaughlin v. G. H. Cross Co.*, 361 Ill. 405 (1935), *aff'd.* 298 U.S. 155 (1936).

<sup>7</sup> An amendment to such effect is being proposed to Congress by the United States Attorney General.

<sup>8</sup> *Hearings Before the Senate Committee on the Judiciary*, 86th Cong., 1st Sess., at 1 (1962).

Buchalter, Jacob 'Gurah' Shapiro, Joseph 'Socks' Lanza, George Scalise, Frank Erickson, John 'Dio' Dioguardo and Frank Carbo"<sup>9</sup> and other underworld leaders. In addition, Hogan has used wiretapping evidence to deport several undesirables from this country, including syndicate big wig Joseph 'Adonis' Doto. With the aid of wiretaps, he successfully prosecuted a one-half million dollar stolen bond ring and solved a fake charities racket. Court-ordered wiretapping was used by Hogan to break up an underworld policy operation and to smash a notorious labor extortion ring. It was instrumental in the smashing and prosecution of the infamous basketball and boxing scandals of a few years back.<sup>10</sup>

District Attorney of King's County, New York, Edward S. Silver, has also testified before Senate Committees. He states unequivocally that "we [law enforcement officers] need this tool to fight crime."<sup>11</sup> Other fair minded individuals have expressed the need for this type of legislation. These persons include Kenneth Keating, former Senator from New York, J. Edgar Hoover, Director of the Federal Bureau of Investigation, President Dwight D. Eisenhower<sup>12</sup> and former Attorney General, now Senator from New York, Robert F. Kennedy, who has written that:

Existing law has proved ineffective, both to prevent indiscriminate wiretapping which seriously threatens individual privacy and to afford a clear cut basis for the legitimate and controlling use of wiretapping by law enforcement officials. Investigation has documented the ease with which leading racketeers can insulate themselves from their illegal operations and rely on this nation's elaborate communications system to direct such activities. To deny law enforcement officers the right to monitor telephone communications is to permit our nation's vast communications network to be used with impunity by the underworld in conduct of major criminal activity.<sup>13</sup>

Senator Kennedy's successor as Attorney General, Nicholas de B. Katzenbach, has also expressed the need for such legislation:

The telephone may be an instrumentality of crime, as in cases where it is used as the medium for a threat of extortion or a demand for a kidnap ransom. The telephone is also very extensively used for the conduct of criminal business,

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Silver, *Law Enforcement and "Wire Tapping,"* 50 J. CRIM. L., C. & P.S. 576, 580 (1960).

<sup>12</sup> As reported during the public hearings before the Illinois Crime Investigating Commission, February 5-6, 1965.

<sup>13</sup> Letter to the Speaker of the United States House of Representatives, January 14, 1963.

just as it is for other kinds of business. Its use helps criminals to escape detection. It is often difficult for the recipient of a telephone ransom demand or extortion threat to identify the maker of the demand or threat. And it is difficult to find who a man's contacts are when face to face meetings seldom occur. We believe that a legislative solution to the wiretapping problem is long overdue.<sup>14</sup>

The Honorable J. Edward Lumbard, Chief Judge of the Second Circuit Court of Appeals, the district in which the New York court-ordered wiretapping statute has been operating, has commented that he could not understand how there could be any sound objection to legalized wiretapping under court supervision.<sup>15</sup>

Judge George Edwards whose well-rounded experiences include terms on the federal bench and the Michigan Supreme Court, as well as Detroit Police Commissioner, states:

I do not see any essential difference between a judge issuing a search warrant which allows a police officer to listen to a telephone conversation and his issuing a search warrant which allows that same police officer to go into a person's home to search his desk.<sup>16</sup>

These persons are convincing in their contention that there is a legitimate need for court-ordered wiretapping to combat organized criminal activity.

#### LEGISLATIVE SAFEGUARDS

Satisfied that there is a need for court-ordered wiretapping and that such a statute would be constitutional, the next question is whether such a statute can be drafted which will safeguard the rights of individual citizens.

It is proper to examine experiences in New York to ascertain whether abuse is necessarily inherent under any court-ordered wiretapping procedure. In this regard, District Attorney Hogan states:

Over the years, committees, commissions, individuals have investigated intensively our use of this constitutionally authorized privilege. There has been no evidence produced that law enforcement officials have abused the privilege. Quite the contrary! There is agreement that we have used this investigative weapon fairly, sparingly and with most selective discrimination.<sup>17</sup>

Hogan adds: "this has been our law for 20 years and I know of no instance in which the authority has been abused."<sup>18</sup>

<sup>14</sup> From a speech before the Third Judicial Circuit of the United States Court of Appeals, 1962.

<sup>15</sup> Speech before the Chicago Crime Commission, October 15, 1964.

<sup>16</sup> From remarks on a radio broadcast (WBBM, Chicago, Illinois), May 10, 1963.

<sup>17</sup> *Supra* note 8 at 1.

<sup>18</sup> *Supra* note 8 at 5.

Had there been any abuse in the administration of the New York court-ordered wiretapping statute, the person probably most aware of that abuse would be the Chief Judge of the Second Circuit Court of Appeals, which Circuit includes the State of New York within its jurisdiction. He notes none.<sup>19</sup>

In June of last year, Mayor Richard J. Daley appointed the "Mayor's Committee on Organized Crime Legislation" to draft Legislation aimed at combating organized criminal activity. The 47 members of this Committee included the top Federal, State, and local law enforcement officers in the community, professors of criminal law at our leading law schools, respected members of the Illinois Bar, and trained sociologists.

After many meetings of both the drafting subcommittee and the full committee consisting of hours of research, discussion, drafting and redrafting, the Mayor's Committee adopted, as one of its legislative proposals, a bill authorizing court-ordered wiretapping. Only three of the 47 members have noted their dissent to this bill.

Despite the fact that there are no reported abuses in the application of the New York wiretapping statute, the Mayor's Committee adopted a host of new features aimed at further protecting the liberties of the innocent. As a matter of fact, each of the arguments presented against court-ordered wiretapping at the 1963 session of the Illinois Legislature was analyzed, and safeguards were provided in the present bill covering each potential abuse cited.<sup>20</sup> For that reason, this bill is approximately four to five times the length of a predecessor wiretapping bill offered to the 1963 Legislature. This added verbiage consists primarily of procedural safeguards.

The bill drafted by the Mayor's Committee includes the following safeguards. The police as such could not petition for a court-ordered wiretap. Only the Attorney General or the State's Attorney may do so. By restricting the power to initiate a wiretap to attorneys rather than police officers, protection against potential abuse is provided. Only certain judges could issue the wiretap order. In Cook County, a Circuit Court judge assigned to the criminal division of the Circuit Court of Cook County would be so empowered. Outside of Cook County, only Circuit Court judges could issue the order. The Su-

<sup>19</sup> *Supra* note 15.

<sup>20</sup> A court-ordered wiretapping bill presented to the 1963 Illinois Legislature was summarily defeated. This bill contained none of the safeguards of the 1965 bill, which is cited in full text as an Appendix to this article below.

preme court of Illinois would review wiretap orders, and where it determined that an order was issued in bad faith, the court could bar the prosecuting officer from future eligibility to file petitions under the proposed bill. In such circumstances, the court could also prohibit the judge who abused his authority from signing future wiretap orders. Thus, not only would this new procedure be under the sole jurisdiction of lawyers and judges, but there would be a continuing review by the Illinois Supreme Court to insure against abuses.

The wiretap would be installed only by persons designated in the court order. If the tap is installed by any unauthorized person, evidence received would not be admissible and the persons who installed the tap would be subject to criminal penalty. It would be required that the tap be installed within 15 days of the signing of the court order and only be operative for a period of up to 60 days.

The petition would state facts sufficient to show probable cause that a specific offense has been committed or is about to be committed. It would also contain a sworn statement from the State's Attorney or the Attorney General that the wiretap will lead toward the solution or prevention of that offense. This procedure would apply only to specifically named crimes which are characterized as organized criminal activity. Thus, for example, a wiretap could not be secured for the offense of rape or for ordinary theft. A judge could not sign an order where the telephone subscriber has been charged with an offense, and if he is charged with an offense after the tap has been installed, it would be required to be removed.

If there has been a prior petition and order, in regard to the same subscriber or the same telephone number, a new petition must be brought before the same judge. A judge signing a wiretap order would have before him the complete history of other petitions or orders pertaining to that same phone or subscriber. The judge could hold a hearing in which the petitioner and other witnesses would be required to appear before he decides whether or not to sign the order.

The petition and the order would be kept secret to insure against the possibility of blackmail or embarrassment. Aside from the petitioner, only the Illinois Supreme Court and those Attorney Generals or State's Attorneys authorized by the Illinois Supreme Court could examine these orders and petitions.

The persons installing the tap could not physically trespass upon the residential or other property of the subscriber. If they did so

trespass, the wiretap order would be void and they would be subject to criminal penalty.

Where wiretap evidence is to be used at trial, the prosecution would have to furnish the defendant with a copy of the petition and order, and would be required to identify those persons whose voices are heard on the wiretap tape.

Even where wiretap evidence is not to be offered at trial, a defendant who believes that his phone has been tapped could petition the court to order the State's Attorney to produce any petitions and orders relating to his phone. Such petitions and orders, if any, would be delivered to the defendant if the judge believes that information received could have any bearing upon the issues at the trial.

The penalty for illegal wiretapping would be increased from a maximum of one year in the County jail to a maximum of five years in the penitentiary. Any wiretap not in accordance with all the provisions of the proposed bill would render the individuals involved therewith subject to this stiff criminal penalty.

The proposed bill would have died automatically on January 1, 1968, if not re-enacted by the 75th General Assembly in 1967. Thus, the prosecution would have had the burden of proving to the next General Assembly that during the two-year trial period there were positive results from its use, and no prosecutive abuse.

The history of the fair application of the New York wiretap statute, coupled with the added safeguards of the proposed Illinois statute, indicates that there is little reason to fear that the liberties of innocent individuals would be subject to abuse under the proposed bill.

#### CONCLUSION

There is a need for the proposed wiretap bill. The crime rate generally is increasing at a frightening rate, and organized criminal activity in particular is virtually unchecked. Organized crime which uses all the modern techniques of electronics and communication can no longer be combatted with horse and buggy methods. The telephone is an essential tool in any highly organized business activity, including the business of organized crime. The proposed bill is the sole means of neutralizing this tool.

In my opinion, the proposed bill is constitutional. Until the United States Supreme Court says otherwise, and it has not so said, court-ordered wiretapping is a proper subject for state legislation.

Finally, I believe that the proposed bill safeguards the individual from fear of potential police abuse. I do not share the view of either those persons who insist upon unfettered court-ordered wiretapping or of those persons who insist that any court-ordered wiretapping regardless of safeguards violates individual liberties. I do not agree with these persons that the legitimate goals of law enforcement and the constant need to protect the liberties of the individual must necessarily clash. One individual right is often overlooked. Each of us has the individual right to live in a society free of organized criminal activity, and whether this is termed a collective individual right or a right of society is unimportant. I believe such right exists. New means should be taken to eradicate organized crime, and this can be done without violating anyone's personal freedom. The proposed wiretapping bill of the Mayor's Committee on Organized Crime Legislation accomplishes just that. It is hoped that in 1967, the 75th General Assembly of the Illinois Legislature will agree.

## APPENDIX

HOUSE BILL NO. 270

(74TH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS)

### A BILL

For an Act to add Section 108-15 to the "Code of Criminal Procedure of 1963," approved August 14, 1963 (as amended).

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*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

Section 1. Section 108-15 is added to the "Code of Criminal Procedure of 1963," approved August 14, 1963, the added section to read as follows:

Sec. 108-15. Ex Parte Order for Interception of Telephonic Communications. (a) For purposes of this Section, "telephonic communications" means any transmission of sound by aid of wire, cable or other similar connection between the points of origin and reception; "interception" means the use of an eavesdropping device at or between any points of origin and reception of a telephonic communication, and the hearing or recording thereof; "telephonic apparatus" means a point of origin or reception of a telephonic communication; and "number" means the identifying number assigned by the common carrier by wire to the telephonic apparatus.

(b) Upon the written petition under oath or affirmation of the Attorney General or of the State's Attorney of the county of the requested interception, a judge of the Criminal Division of the Circuit Court, if such county is Cook County, or a Circuit Court judge, if such county is other than Cook County,

may issue an ex parte order for interception of telephonic communications for a period of no more than 60 days, by public officers and public employees and by means of an eavesdropping device as defined in Section 14-1 of the "Criminal Code of 1961," approved July 28, 1961, as heretofore and hereafter amended, which order shall become void 15 days after issuance if no eavesdropping device is used during that period pursuant to the order.

(c) The petition shall state facts sufficient to show probable cause that an offense prohibited by any of Sections 9-1, 10-1, 10-2, 11-14, 11-15, 11-16, 11-17, 11-19, 11-20, 12-6, 16-1(d), 18-1, 18-2, 19-1, 20-1, 20-2, 28-1(a)(3)-(10) and 28-3 of the "Criminal Code of 1961," approved July 28, 1961, as heretofore and hereafter amended, or prohibited by the "Uniform Narcotic Drug Act," approved July 11, 1957, as heretofore and hereafter amended, or that a conspiracy to commit any of the aforesaid principal offenses has been or is about to be committed and shall state that the petitioner has reasonable grounds to believe that evidence toward the solution or prevention of such offense will be obtained by the interception, and shall state that the subscriber has not been charged with such offense. The petition shall state the name of each person authorized to perform the interception, and the name of the subscriber and the number of the telephonic apparatus receiving or transmitting the telephonic communications to be intercepted. A copy of every preceding petition and ex parte order pursuant to this Section for interception of communications of the same telephonic apparatus and of the same subscriber shall be attached to the petition, which shall be presented to the same judge who issued a preceding ex parte order relative to the same apparatus or subscriber unless he is shown to be no longer a judge, or disqualified to issue such an order, or outside the county when the petition is filed.

(d) The judge may examine the petitioner and other witnesses under oath in camera, and the order shall be preceded by a finding of probable cause as alleged and shall state the name of every person authorized to perform the interception, the number of the telephonic apparatus, and the period of execution of the order, which period shall not extend more than 60 days beyond the date of initial installation of the eavesdropping device. Such period of execution shall terminate immediately when the subscriber has been charged with the offense alleged in the petition.

(e) The judge shall personally retain the petition and a copy of the order. The order and all other copies of the petition and order shall be personally retained by the petitioner, who shall file a copy of the petition and a copy of the order with the Clerk of the Supreme Court no later than 10 days after expiration of the period of execution. Such filed copies may be inspected only by members of the Supreme Court and, upon written approval of four members thereof, by the Attorney General and by any State's Attorney. No other disclosure of the fact or contents of a petition or order, except to persons lawfully engaged in the preparation or execution thereof, is authorized. Upon concurrence of four members of the Supreme Court that a petition has been presented or an ex parte order issued in bad faith, the Supreme Court may by written order of four members thereof permanently disqualify the petitioner or the judge from future activity pursuant to this Section, a copy of which order shall be served upon the disqualified person.

(f) Within 6 months of the granting of the ex parte order under subsection (d) hereof, a copy of the related petition and ex parte order shall be sent by

petitioner by certified mail to the subscriber and proof of such mailing shall be filed with the Supreme Court and with the judge granting the order.

(g) Only the specific persons authorized shall perform the interception. If any of those persons in the performance of the interception physically trespasses upon residential or other property of the subscriber, except property open to common use and traffic by the subscriber and the tenants of other parts of a building containing his property, the ex parte order shall be void.

(h) When proof of the contents of an intercepted telephonic communication is to be offered by the State in a criminal prosecution, the State shall at least 10 days before trial inform each defendant of the date of the intercepted communication and, if known, of the identity of the parties to the communication and shall at such time furnish each defendant with a copy of the related petition and ex parte order, or such proof shall be inadmissible.

(i) Prior to trial or, if opportunity therefor did not previously exist or the defendant was not previously aware of the grounds therefor, during trial, a defendant may move to suppress as evidence the proof of the contents of an intercepted telephonic communication upon the ground that the interception was performed in violation of this Section. The motion shall be in writing and shall specifically allege such violation. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the interception was performed in violation of this Section shall be upon the defendant.

(j) Upon written motion of a defendant made prior to trial, the judge shall order the State's Attorney to produce a copy of every preceding petition and ex parte order pursuant to this Section for interception of communications of a telephonic apparatus subscribed to by the defendant and located in the county of the prosecution or, if known by the State's Attorney, located elsewhere in this State. Such copies shall be examined by the judge in camera, and shall be delivered to the defendant if the judge believes that information received from such intercepted telephonic communications could have any bearing upon evidence offered during such prosecution.

(k) Evidence of an offense received from a communication of a telephonic apparatus subscribed to by a defendant and intercepted pursuant to this section shall be inadmissible at the trial of that defendant, if he has been charged with such offense prior to the interception.

(l) No ex parte order pursuant to this Section shall be issued or effective after July 1, 1967.