

FEDERAL INJUNCTION DENIED TO PREVENT USE OF WIRE TAP EVIDENCE IN STATE COURTS

Pugach v. Dollinger
365 U.S. 458 (1960)

New York police officers tapped petitioner's telephone line pursuant to state law¹ and obtained information leading to his arrest.² When the district attorney expressed his intention to introduce the intercepted communication into evidence, petitioner brought suit in federal district court to enjoin such use.³ Petitioner argued that disclosure of the communication would violate section 605 of the Federal Communications Act of 1934⁴ and that he would sustain irreparable injury if convicted. An injunction was denied by the district court,⁵ and the denial was subsequently affirmed by the court of appeals.⁶ The Supreme Court affirmed per curiam.⁷

An individual is afforded no constitutional protection against wire tapping by the fourth amendment.⁸ Protection is afforded by section 605, state constitutions and statutes prohibiting wire tapping,⁹ and court decisions prohibiting the introduction of wire tap evidence.¹⁰ It is debatable whether Congress intended to encompass the entire area of wire tapping in section 605 and preclude any state legislation.¹¹

The apparent conflict between the unqualified language of section 605 and those state laws which permit wire tapping has been resolved in favor

¹ N.Y. Const. art. I, § 12 protects the individual's privacy of communication except where there is reason to believe evidence of crime can be obtained. Certain procedures must be followed in obtaining this information or the officials can be subjected to prescribed penalties. N.Y. Code of Criminal Procedure § 813(a) and (b).

² Petitioner was charged with felonious possession of firearms, burglary, maiming, assault, and conspiracy.

³ *Pugach v. Dollinger*, 180 F. Supp. 66 (E.D.N.Y. 1960).

⁴ 48 Stat. 1103, 47 U.S.C. § 605 (1934). The relevant part of § 605 states that ". . . no person not being authorized by the sender shall intercept any communication and divulge the existence, contents, substances, purport, effect or meaning of such intercepted communication to any person. . . ."

⁵ *Pugach v. Dollinger*, *supra* note 3.

⁶ *Pugach v. Dollinger*, 277 F.2d 739 (2d Cir. 1960).

⁷ The Court affirmed without opinion on the authority of *Schwartz v. Texas*, 344 U.S. 199 (1952) and *Stefanelli v. Minard*, 342 U.S. 117 (1950). Justice Douglas wrote the dissenting opinion.

⁸ Wire tapping does not constitute an illegal search or seizure. *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

⁹ E.g., Ohio Rev. Code § 4931.28: "No person shall willfully and maliciously . . . tap . . . a telephone wire. . . ." Ohio Rev. Code § 4931.99 provides a penalty of not less than fifty dollars nor more than one thousand dollars or imprisonment of not less than one year nor more than three years or both for violations of section 4931.28. A summary of the various state laws is found in Rosenzweig, "The Law of Wire Tapping," 33 Cornell L.Q. 73 (1947).

¹⁰ See note 27 *infra*.

¹¹ 73 Cong. Rec. 4138, 8822-37, 8842-54, 10304-32 (1934). The debate in Congress preceding the passage of § 605 did not discuss whether this section was intended to prevent all wire tapping or whether information obtained in such manner was to be admitted into evidence.

of the states by the Court.¹² Underlying the explicit reasons given in support of the Court's prior holdings is a process that involves balancing the purpose or utility of state laws against the resulting impact on the interests of the individual and society as a whole.¹³ This balancing process is equally applicable in the instant case. If in fact section 605 was designed to provide the same protection for communications that the fourth amendment provides for home and person, the same type of considerations used to determine the validity of state laws alleged to violate that amendment would be applicable when wire tapping statutes are tested.¹⁴

The utility of state laws which permit wire tapping is the aid given law enforcement officials in stemming criminal activities.¹⁵ When used by law enforcement officials under adequate control, it is no less desirable than the use of informants, decoys, dictaphones, and undercover agents.¹⁶ However, wire tapping by private individuals for purposes as diverse as labor espionage and surveillance of a wife's activities is of questionable value.¹⁷ The opposition to private wire tapping loses much of its force when directed at official utilization of the practice in solving kidnappings and murders, combatting organized crime, and counteracting espionage activity.¹⁸ While wire

¹² The Supreme Court in *Schwartz v. Texas*, *supra* note 7, decided that § 605 did not bar the use of wire tap information as evidence in a state criminal proceeding. While the Court recognized that the introduction would be a violation of § 605, it said that in the absence of an expression by Congress § 605 would only be an additional factor for state courts to consider in forming their rules of evidence.

¹³ ". . . While we must recognize the need of society to protect itself against serious crimes, we must at the same time acknowledge the right of the individual to be protected against unwarranted search and invasion of his privacy." 107 Cong. Rec. 2590 (daily ed. Feb. 28, 1961) (remarks of Senator Dodd). The use of this balancing process is discussed in Karst, "Legislative Facts in Constitutional Litigation," *The Supreme Court Review* 75, 84 (1960).

¹⁴ The Court believes the same considerations that influenced Congress to adopt the fourth and fifth amendments protecting against procedures violative of the right of privacy may have prompted Congress to pass § 605. *Nardone v. United States*, 302 U.S. 379, 383 (1937).

¹⁵ "Enforcement officers seem to differ in their estimates of the value of wire tapping. District Attorney Thomas E. Dewey called it 'one of the best methods available for uprooting certain types of crime.' 1 Rev. Record N.Y. Const. Con. 372 (1938). J. E. Hoover, Director of the Federal Bureau of Investigation, termed it an archaic and inefficient practice which 'has provided a definite handicap or barrier in the development of ethical, scientific, and sound investigative technique.' Letter to Harvard Law Review, Feb. 9, 1940, 53 Harv. L. Rev. 863 (1940)." Rosenzweig, *supra* note 9, at 90 n. 234.

¹⁶ Since 1931 every Attorney General has endorsed the practice of wire tapping as an investigative technique in certain types of cases. Rogers, "The Case for Wire Tapping," 63 Yale L.J. 793, 794 (1954).

¹⁷ Westin, "The Wire Tapping Problem: An Analysis and a Legislative Proposal," 52 Colum. L. Rev. 165, 168 (1952).

¹⁸ "The need for wire tapping by both Federal and State and local law enforcement officers, to assist in the investigation and prosecution of serious and heinous crimes and sustained criminal activity, has been amply testified to over the years." Dodd, *supra* note 13.

tapping by officials can further the governmental enforcement of criminal laws, there is some fear that permissive monitoring of the communications system may suppress the free expression of political ideas or even bring about the conditions of a police state.

Controlled wire tapping enables officials to prevent some crimes and assists in the solution of others. There are those who would forego these results for the supposed peace of mind which would result from a ban of all wire tapping. However, even if all wire tapping were prohibited by law, some private individuals and state officials would probably continue the practice. Under a controlled system the officials, at least, would have judicial supervision.¹⁹ Wire tapping is not indispensable in criminal investigation and is subject to misuse.²⁰ Alternative methods of detection are available, but they are often more time consuming and may be less reliable.²¹

To be balanced against the utility of controlled wire tapping is its impingement on the privacy of the individual. The nature of wire tapping prevents the individual's awareness of its use, thus making it difficult for him to protect against it. Wire tapping has a greater impact than illegal search and seizure of property because its non-selectivity subjects every person using the monitored line, whether a criminal suspect or not, to the same invasion of privacy.²² Privileged communications between attorney

¹⁹ N.Y. Const. art. I, § 12 preserves the individual's right to privacy of communication except where it is thought evidence of crime can be obtained. N.Y. Code of Criminal Procedure § 813(a) requires *ex parte* orders to be obtained from judicial officials before wire tapping can take place. Only high ranking police officers may obtain these orders upon oath that there are reasonable grounds to believe evidence of crime may be obtained. The judge may examine the officer under oath to determine the reasonableness of the grounds. Section 813(b) provides a maximum penalty of two years imprisonment for officers who willfully intercept telephone communications without authority. To have a completely effective plan of controlled wire tapping two more important controls are needed which are missing in the New York system. The first is the need to restrict the use of wire tapping to specified types of major crimes. It is reported that orders have issued in New York on suspicion that a misdemeanor has been committed. Westin, *supra* note 17, at 192. The second is not to admit wire tap information as evidence unless it was secured under court order. Since it may be difficult to secure convictions under § 813(b), the exclusion of evidence would be an added incentive for officers to secure orders before tapping wires. The New York courts presently permit evidence not obtained under court order. Application for Order Permitting Interception of Telephone Communication Anonymous, 136 N.Y.S.2d 612 (1955).

²⁰ See note 23 *infra*.

²¹ Information can be obtained by eavesdropping, informer, undercover agents, observation, and dictaphones to name a few. These were in use before the development of electronic communications. But today when time is important in preventing and in solving crimes, the law enforcement officers should not be denied the use of electronic interception devices when the criminal has the full use of the communication system.

²² In his dissent in *Olmstead v. United States*, *supra* note 8, Justice Brandeis noted that when a telephone is tapped the privacy of the individuals at both ends is invaded and all conversation even though confidential and privileged will be overheard.

"In the course of tapping a single telephone, a police agent recorded conversation involving at the other end, the Julliard School of Music, Brooklyn Law School, Con-

and client or physician and patient are no longer protected. The fear the individual may have of losing this privacy of communication is not allayed by the unconvincing assurance that a controlled system will function in practice as it does in theory. Analysis of the former New York system indicates the types of undesirable practices that can result where there is lax administration of controlled wire tapping and where there are no adequate criminal penalties directed at officials who violate established procedures designed to prevent arbitrary wire tapping.²³

Once there has been an illegal invasion of privacy, under a controlled system or a complete ban, one must consider what utilization to make of resulting information. When such information is excluded, the court may be denied valuable evidence in determining the guilt or innocence of an individual. If the introduction of wire tap evidence is not prohibited by statute, it should be admitted due to the accuracy of this form of recording conversations. This is the rationale of the common law rule which permits the introduction of illegally obtained evidence.²⁴

The right to the private use of a telephone is not an inherent right of man, but one derived from society itself.²⁵ Society may limit this right if the individual's interest is outweighed by a compelling social interest. The exclusion of the evidence combined with a ban on wire tapping is the most effective means of protecting the rights of the individual, even though some criminals may consequently escape conviction.²⁶ To facilitate society's interest in preventing crimes the individual may be required to surrender his absolute privacy in some instances, while being assured privacy in other

solidated Radio Artists, Western Union, Mercantile Commercial Bank . . ." and sixteen other establishments or individuals. Westin, *supra* note 17, at 188 n.112.

²³ "Corruption, blackmail, misuse of warrant procedure, failure to prevent unauthorized wire tapping, and loss of general confidence in the security of the telephone as a medium of communication have been revealed as factual appendages to the New York structure." Westin, *supra* note 17, at 192. This evaluation was made before the passage of § 813(b) of the N.Y. Code of Criminal Procedure.

²⁴ While federal courts exclude evidence obtained by wire tapping it is because of judicial implication and not because of fourth amendment requirements or Congressional legislation. The common law does not exclude evidence obtained by illegal search and seizure because exclusion is not considered vital to the protection of society from these practices.

²⁵ 107 Cong. Rec. 5021, 5022 (daily ed. March 30, 1961) (remarks of Senator Dodd).

²⁶ The exclusionary rule, as formulated in the federal courts, does not directly prevent wire tapping, but discourages its use since federal officials cannot introduce the results into evidence. Twenty-six states now follow this rule. *Elkins v. United States*, 364 U.S. 206, 224 (1960). If there is a complete ban on wire tapping, the rule protects any individual, innocent or guilty, from the disclosure of his conversation. Under a controlled system, the protection is in the form of requiring officials to follow the strict procedural requirements before information may be introduced into evidence. However, if the statutory procedure is followed and the information is used to secure a conviction, an important interest of society has been served. This same interest cannot be fully served under the use of the exclusionary rule in conjunction with a complete ban because some of the guilty may be released if they come within the rule and the evidence is excluded.

instances. A controlled system could provide privacy without loss of criminal convictions. The most important safeguard to assure unwarranted intrusion under a controlled system is the exclusion of illegally obtained information. If the evidence is not excluded, the civil remedies or criminal penalties available to the individual are insufficient compensation for the injuries caused by wire tapping.²⁷

The legislative facts and considerations discussed above have not appeared in any of the Court's decisions which permit the use of wire tap information in state courts. In the area of wire tapping the issues must be narrowly defined and special legislation enacted to deal with the problem. Questions such as whether law enforcement officials should be permitted to tap wires, and if so, what utilization can be made of resulting information are not satisfactorily answered by broad legislation such as section 605 or general rules that exclude or permit all wire tap evidence. The New York system is a step towards answering some of these questions. Apparently, the Court is permitting the states to develop their policies in regard to wire tapping until there is a more definite expression of Federal policy. This action by the Court enables Congress to evaluate the results of state experimentation before enacting new legislation.²⁸

²⁷ The individual may suffer execution or imprisonment if convicted with the use of wire tap information. Whether convicted or not, there is the invasion of his privacy. When there is a complete ban on wire tapping both innocent and guilty have a right to attempt recovery of damages for this invasion. The controlled system should limit recovery to the innocent individual. Under either system the impact on the individual, in addition to conviction, takes the form of inadequate remedies and obstacles to recovery. To secure the punishment of an official for violating laws which prohibit wire tapping or establish procedures it is usually necessary to prove willfulness on the part of the official. In addition, prosecuting officials are hesitant to prosecute other officials who have aided them in preparing criminal cases.

If an individual brings a civil action against an official for trespass or invasion of privacy, he will at best recover only nominal damages, unless he can prove substantial damage. The person convicted of a crime is less likely to recover because of the jury's lack of sympathy for him. Even if an action is successfully brought and damages recovered, unless the official has sufficient funds available to pay the judgment, the individual may find collection difficult because civil servants' salaries often cannot be garnished. 6 McQuillin, *Law of Municipal Corporations* § 2681 (2nd ed. 1928).

²⁸ Two bills have been introduced in the present session of Congress. Senator Keating's bill (S-1086) would amend Chapter 223 of Title 18 to permit interception of communications in compliance with state laws and permit the intercepted communication to be introduced as evidence if such interception was made after a determination by a court that reasonable grounds existed for belief that such interception might disclose evidence of the commission of a crime. 107 Cong. Rec. 2573 (daily ed. Feb. 28, 1961).

Senator Dodd's bill (S-1495) would establish a wire tapping system similar to that of New York with additional safeguards. Wire tapping by federal officials would be permitted only upon issuance of a court order. Minimal standards would be established and the states would also be required to meet these same standards. Wire tapping would be limited to serious crimes and evidence obtained in violation of established procedures would be inadmissible in court. Also officials would be required to make periodic reports regarding their use of wire tapping. 107 Cong. Rec. 2590 (daily ed. Feb. 28, 1961).