



ARLEN SPECTER
DISTRICT ATTORNEY

DISTRICT ATTORNEY'S OFFICE

ROOM 666 CITY HALL

PHILADELPHIA, PENNSYLVANIA 19107

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A DISTRICT ATTORNEY'S VIEW
ON THE
RIGHT OF PRIVACY

Walking the tightrope between vigorous law enforcement and the constitutional rights of the individual has become a daily challenge for a District Attorney in a big city. Almost forty years ago, Mr. Justice Holmes said that wiretapping was "dirty business".* In the public mind, all forms of electronic surveillance tend to be associated with that famous denunciation by Justice Holmes.

The public has responded with sharp emotional opposition to the use of electronic devices to pry into their privacy. The lines become obscured among wiretapping, eavesdropping and transmission or recording by one of the parties to a conversation. Law enforcement officials must be meticulous not only in observing the law, but also in appearing to observe the law. The integrity of an Office such as that of District Attorney requires following the interdiction about Caesar's wife.

Even though all should know, it is worth repeating from time to time that the public prosecutor has a positive duty to convict the guilty so long as he does so by lawful methods. While constantly reminding the prosecutor of constitutional limitations, the Supreme Court of the United States has also been explicit that relevant and competent evidence must be brought into the criminal trial, absent some exclusionary rule:

*Olmstead v. United States, 277 U.S. 438, 470 (1928)

"The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of the function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained - for example, by violating some statute or rule of procedure - compels the formulation of a rule excluding its introduction in a federal court."*

So the traditional balancing of values begins.

WIRETAPPING

My views on wiretapping are easy to state. The law of Pennsylvania prohibits wiretapping in absolute terms. I am personally opposed to wiretapping. My experience in law enforcement indicates that it is unwise, as a matter of social policy, to have wiretapping.

My seven years as an Assistant D.A., Assistant Attorney General of Pennsylvania, and District Attorney lead me to the conclusion that wiretapping is not an indispensable tool for law enforcement in a big city. I have not seen any case where it would have been of assistance involving any of the major felonies such as murder, robbery, rape, arson or burglary.

I do believe that it would be helpful in the investigation of organized crime, but its utility is outweighed by the dangers involved. I do not underestimate the problems posed by gambling syndicates, loan sharking and other forms of organized crime. While comparisons are never precisely accurate, it is my opinion that our law enforcement activities in Philadelphia are as successful as other jurisdictions where court-approved wiretapping is permitted.

The dangers of wiretapping are obvious. Once the equipment and technical expertise are available, they are subject to abuses for many improper purposes. It is a source of information for blackmail and

*Lopez v. United States, 373 U.S. 427, 440 (1963)

extortion. It is a source of information for political harassment. It is a source of information for what is, simply stated, nobody's business.

It is my view that the dangers from wiretapping are not removed by providing for judicial approval in advance. Experience has shown that judicial approval for search and seizure warrants is more a matter of form than of substance in guaranteeing the existence of probable cause. This problem is particularly acute in Philadelphia where we have magistrates who are not learned in the law. They do not possess the technical competence to evaluate the legal requirements of probable cause. In some situations they affix their judicial signatures and seals with indifference.

Requiring approval by a judge of a court of record would offer substantially better protection. Even in that situation, however, judges tend to rely upon the prosecutor. Most of the time such reliance is well founded. But the practicalities of life are the issuance of an ex parte order is likely to get less than tough scrutiny where the judge knows and relies upon the prosecutor. As a general rule, and speaking as one of the group, I think the prosecutor can be trusted; but those who advocate court-approved wiretapping should candidly concede that it will depend on the prosecutor's judgment and fairness, as a practical matter.

Even with court approval, backed by mandatory disclosure of all applications after a limited period of time, I am opposed to such wiretapping unless local law enforcement can demonstrate a compelling case showing that serious crime can be combatted by wiretapping.

Most of my prosecutor colleagues favor wiretapping. At the Pennsylvania District Attorneys Convention last July, my vote was the only one cast against a resolution to recommend court-approved wiretapping to the General Assembly. Then, as now, I indicated a willingness to listen to experiences which would show wiretapping to be an important tool for solving serious crimes. Not one offered any specific situations in support of their general position. Based on what I know and have heard, I am opposed to changing the Pennsylvania law which prohibits any kind of wiretapping.

It may be that there are compelling reasons for federal law enforcement officials to engage in wiretapping on national security cases. My experience is not sufficient to express a firm opinion on that subject. If it is to be done, however, there should be the requirement that the application be made to a federal court by a high ranking official of the Justice Department who has personally reviewed the details of the case before asserting that the wiretapping is necessary.

EAVESDROPPING

I am opposed to invasion of the right of privacy which constitutes real "eavesdropping". The Supreme Court of the United States has ruled out use of an electronic device which constitutes an unlawful physical invasion of a constitutionally protected area.* The Supreme Court has said that eavesdropping is not involved when a law enforcement official uses an electronic device to corroborate a conversation which could otherwise have been heard.**

*Silverman v. United States, 365 U.S. 505 (1961)

**Lopez v. United States, 373 U.S. 427, 439 (1963)

In Lopez, an Internal Revenue agent was equipped with two electronic devices, a pocket battery-operated transmitter and a pocket wire recorder. Upholding the conviction obtained with such corroborating evidence, the Supreme Court said:

"Indeed this case involves no 'eavesdropping' whatever in any proper sense of that term. The Government did not use an electronic device to listen in on conversations it could not otherwise have heard. Instead, the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose. And the device was not planted by means of an unlawful physical invasion of petitioner's premises under circumstances which would violate the Fourth Amendment. It was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself."*

With certain added safeguards, the Supreme Court recently affirmed a conviction in Osborn v. United States where the prosecution used a tape recording of a conversation between the defendant and a member of the Nashville Police Department.** The tape recording was authorized in Osborn by two judges in the United States District Court who were presented with an affidavit by the Nashville police officer.

TRANSMISSION OR RECORDING OF A CONVERSATION

It is my view that the Supreme Court of the United States has upheld the legitimate range of the right of privacy in cases like Osborn and Lopez. In those situations, the electronic devices do nothing more than corroborate what one party to the conversation could otherwise offer as testimony. Absent a confidential communication, where A speaks to B,

* 373 U.S. at 439

**Osborn v. United States, 87 S.Ct. 429 (1966)

the information stated by A to B is no longer private. If the testimony of B is competent and otherwise admissible at trial, A's right of privacy has not been invaded by corroboration of what A told B. Since B can testify to such a conversation at trial, it is in my opinion highly desirable, as a matter of policy, to permit corroboration through electronic devices to be used at trial.

From time to time, situations arise where a person represents that another party has committed a crime such as extortion, corrupt solicitation or subordination of perjury arising from a conversation between the two. As the District Attorney who must make the decision as to whether to request a warrant of arrest, it is extremely difficult to do so for a number of reasons. First, the person who makes the disclosure to my Office may be incorrectly summarizing the conversation. He may be drawing inferences or stating conclusions as to what he understood, which may be at variance with the precise language or intent of the other party. Second, even if accurate, it may be unwise to prosecute in a context where it is oath against oath so that the outcome is most inconclusive. In some situations, as a matter of law, corroboration may be required.

That factor was expressed by the Supreme Court in Osborn:

"As the district judges recognized, it was imperative to determine whether the integrity of their court was being undermined, and highly undesirable that this determination should hinge on the inconclusive outcome of a testimonial contest between the only two people in the world who knew the truth - one an informer, the other a lawyer of previous good repute."*

*87 S.C. at 433

Under such circumstances, the use of an electronic device may provide protection for all involved. The party who brings the information to the law enforcement officer does not have to rely on his own recollection or interpretation. More important, the prospective defendant is protected because a warrant of arrest is not issued without an opportunity for the prosecutor to make an impartial evaluation of the precise language used to determine if, in fact, a crime has been committed. The use of an electronic device is, realistically viewed, a substantial safeguard for a person who may be accused by a vindictive or careless informant.

The balancing process and the tightrope walking goes on; but let us all be as concerned with the ascertainment of the truth and conviction of the guilty, where evidence can be constitutionally obtained, as we are with the protection of the fundamental right of privacy.