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ELECTRONIC SURVEILLANCE IN NEW JERSEY *

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The desirability of permitting law enforcement personnel to utilize electronic surveillance techniques is an important question and one upon which reasonable men often differ. The issue must be considered within the context of the values involved. The citizens of New Jersey enjoy a full panoply of federal and state constitutional rights. However, these rights are often predicated upon mutually opposing values incident to the safeguards afforded by the Constitution. It bears repeating that all the competing values involved belong to the citizen. The State enjoys none -- it has only duties, and powers with which to discharge them. Stated somewhat differently, the contest is not between the rights of the State and those of the individual. Rather, questions pertaining to electronic surveillance must be considered within the context of the mutually competing constitutional rights of the individual which are at issue.¹

Firmly entrenched in the Constitution is the right of privacy.² Nevertheless, paramount in the hierarchy of constitutional goals is the obligation of government to protect the citizenry against criminal attack.³ In order to properly fulfill government's primary function a delicate balancing process must be employed, juxtaposing this obligation against the responsibility for protecting those individual rights, such as privacy, which are fundamental to a free and stable society. The proper use of electronic surveillance as an investigative tool graphically illustrates how these competing values may be fairly accommodated.

In assessing the need for electronic surveillance, it must be borne in mind that at issue is the critical need of government to gather intelligence in order to satisfy its very reason for being; that is to protect the public. "The power to investigate is basic." The question is not merely whether a particular individual's rights may, in some nebulous fashion, be chilled by utilization of such devices. Rather, the pivotal issue is whether the questioned investigatory techniques are legal, necessary and fair. Indeed, the very existence of government may "chill" the actions of some who would act or speak differently. But government there must be, for without it our values would be worthless. Indeed, the right to privacy itself would be meaningless if there were no legally constituted authority to ensure its preservation.⁴

The need for government to devise effective measures to protect the public from criminal intrusions has become more pronounced with the growing sophistication and mobility of those engaged in illegal conduct. Simply put, no longer is criminal behavior confined within recognized municipal, county or even state boundaries. Rather, it is carried on cautiously and furtively and in as many different ways and conceivable means as human ingenuity can devise. Correspondingly, these modern complexities require new and innovative methods of detection and deterrence in order to cope with the dirty realities of criminal conduct. Hence, it is against this backdrop that the need for, and the permissible parameters of, electronic surveillance must be assessed.

* This article is derived from the remarks of the author before the New Jersey Bar Association on May 27, 1977.

1. See *Anderson v. Sills*, 56 N.J. 210, 226-227 (1970).
2. *Katz v. United States*, 389 U.S. 347, 350 (1967); *Bergen v. New York*, 388 U.S. 41, 53 (1967); see *in re Quinlan*, 70 N.J. 10, 40-41 (1976), certif. den. ___ U.S. ___, 97 S.Ct. 319 (1976).
3. *State v. Bisaccia*, 58 N.J. 586, 590 (1971).
4. *Anderson v. Sills*, *supra* at 226-227.

The apprehension concerning the possible misuse of electronic surveillance devices is readily understandable. It was against such potential abuses that the framers of the Constitution conferred, as against the government, the right of our citizens to be "let alone." Indeed, this is one of the most comprehensive and cherished rights of civilized man. To protect that right, every intrusion by the government upon the privacy of the individual, whatever the means employed, must comport with notions of decency and fairness.⁵ As already noted, the precious right to privacy must be reconciled with the need to assure that our citizens can enjoy that right, and all others, free from criminal attack. Thus, while prudent individuals may discern perils in electronic surveillance, it would be folly to deny government on that account the authority it must have to fulfill its mission. The courts have recognized that lawlessness has a tyranny of its own. It would be self-destructive to deprive government of its power to deal with that tyranny merely because of a figment of a fear that government itself may run amuck.⁶

In New Jersey we have initiated and promulgated strong regulatory measures to ensure against prosecutorial excesses in the sensitive area of electronic surveillance. These guarantees are in the form of strict statutory provisions and administrative safeguards.⁷ New Jersey has undoubtedly the strictest electronic surveillance legislation in the United States. Its statutory scheme far exceeds the federal minimum standards in a number of respects, including the length of wiretap orders, the limit on renewability of such orders and the elimination of surveillance over extraneous conversations.⁸ Moreover, and perhaps more importantly, we have established stringent self-imposed administrative guidelines to insure that both the letter and the spirit of the constitutional and statutory mandates in this area are fully effectuated.⁹

Responsible government is the ultimate guarantor of American liberties. That sense of responsibility has been manifested since New Jersey's initial experience with electronic surveillance in 1968. In that year, the Federal Wire Interception Act was enacted as Title III of the Omnibus Crime Control and Safe Streets Act.¹⁰ That legislation set forth provisions governing the electronic interception of conversations, and enumerated the rights and remedies of individuals aggrieved by such activities. The Federal Act was laudable in that it recognized the need for state sovereignty over local law enforcement. The states were authorized to enact their own electronic surveillance legislation, provided only that such statutes conformed to the "minimum standards" set forth in the Federal Act.¹¹ This approach was desirable for it left to state legislative bodies the responsibility for determining whether, and to what extent, their various law enforcement agencies required the tools of electronic surveillance.

The flexibility built into the Federal Act permitted each state to make, within the "minimum standards," an accommodation between the competing needs for public safety and for maintaining the privacy rights of its citizens. New Jersey's accommodation is embodied in the New Jersey Wiretapping and Electronic Surveillance Control Act of 1968, as amended and reenacted in 1975.¹² This statute goes far beyond the requirements of the Federal Act in protecting our citizenry's right

5. *Olmstead v. United States*, 227 U.S. 438 477-478 (1928) (Brandeis J., dissenting).

6. *Anderson v. Sills*, *supra* at 229.

7. See generally *Hyland & Martinez*, "Wiretapping and Electronic Surveillance: the New Jersey Experience", 173 N.Y.L.J. 1 (Pt. 1) (April 22, 1975), 173 N.Y.L.J. 1 (Pt. 2) (April 23, 1975), 173 N.Y.L.J. 1 (Pt. 3) (April 24, 1975).

8. *N.J.S.A.* 2A:156A-1 *et seq.*

9. See *Hyland & Martinez*, *supra*.

10. 18 U.S.C.A. §2510 *et seq.*

11. 18 U.S.C.A. §2516(2); S.Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968).

12. *N.J.S.A.* 2A:150A-1 *et seq.*

of privacy. Extreme sensitivity has been afforded Fourth Amendment rights both in the explicit statutory language and in the manner in which New Jersey's law enforcement agencies have conformed their conduct to the Act. Several aspects of the statutory scheme are extremely significant.

First, the use of electronic surveillance in state law enforcement is highly circumscribed. Unlike their federal counterparts, state law enforcement agencies do not have a specific responsibility for national security. Certainly, there is no form of warrantless wiretapping in New Jersey to detect foreign subversion. As the United States Supreme Court has observed, electronic surveillance of suspected subversive groups poses a threat to First Amendment, as well as Fourth Amendment, rights.¹³ New Jersey is firmly opposed to state law enforcement bodies maintaining unjustified electronic surveillance over suspected subversive groups. The mission of our state and local police is properly limited to the prevention and detection of crime.

New Jersey's statute forbids any electronic surveillance without prior judicial authorization. In every instance there must be either an order issued before the surveillance commences or, in a very limited "emergency" situation, there must be informal approval by an authorized judge who must receive a formal application within 48 hours.¹⁴ Warrantless wiretapping is illegal in New Jersey and subjects the violator to stiff criminal and civil sanctions. Those sanctions are equally applicable to private citizens and misbehaving public officials.¹⁵

Secondly, by explicit statutory mandate, electronic surveillance may only be conducted as a last resort in the investigation of a select few crimes.¹⁶ These crimes are specified in the New Jersey Act and can be roughly divided into two categories. The first category is comprised of offenses dangerous to human life, such as arson and conspiracy to commit murder. The second, category consists of offenses typically committed by criminal combinations of two or more individuals. These offenses include acts of official corruption and so-called "organized" crimes. It is in this realm of organized criminal activity that most electronic surveillance is concentrated. For example, in 1976 the Attorney General's Office, through the Division of Criminal Justice, obtained 45 wiretap orders. These resulted in 112 arrests, of which 110 related to syndicated criminal activity. This concentration on offenses associated very closely with organized crime is understandable. Crimes of this nature are committed in a surreptitious manner. Telephones are utilized to make unlawful plans and to maintain chains of command. Therefore, the results of electronic surveillance are generally more significant, since the identities of higher ranking criminals can be uncovered. Electronic surveillance is the bane of organized criminal combinations. Without it the prosecution of syndicated offenses would often be impossible. In this regard we should not denigrate the potentially crucial role that electronic surveillance may play in the battle to maintain the integrity of New Jersey's evolving casino gambling industry and law enforcement's efforts to prevent the industry's infiltration by organized crime.

Thirdly, electronic surveillance is a very expensive form of investigation. For example, for the Division of Criminal Justice the average cost per wiretap in 1976 exceeded \$5,200. Hence, there is a built-in financial disincentive for the use of electronic surveillance. This constitutes a powerful administrative factor to assure compliance with the statutory policy of utilizing such techniques only when "normal investigative procedures . . . have failed or reasonably appear . . . unlikely to succeed."¹⁷

13. *United States v. United States District Court*, 407 U.S. 297, 312-315 (1972).

14. *N.J.S.A. 2A:156A-8; N.J.S.A. 2A:156A-13.*

15. *N.J.S.A. 2A:156A-3.*

16. *N.J.S.A. 2A:156A-8; N.J.S.A. 2A:156A-9.*

17. *N.J.S.A. 2A:156A-9(c).*

These factors are part of the reality which surrounds electronic surveillance and circumscribes its use. In addition, a number of external controls, established both by the New Jersey Act and through administrative practice, have been developed to effectuate the legislative goal of minimizing the frequency and intensity of electronic surveillance. The Division of Criminal Justice, maintains a close vigil on developments in federal and state wiretap law.¹⁸ For example, after the United State Supreme Court's decision in *United States v. Donovan*, 429 U.S. 413, (1977), which involved the obligation to present inventories of intercepted conversations to issuing magistrates, new administrative procedures were developed within the Division of Criminal Justice to assure the strictest compliance with statutory requirements. Memoranda outlining these procedures have been distributed by the Division to the county prosecutors.

Another form of administrative control is contained in the reporting requirements which have been written into the federal and state acts. The federal act requires that the attorney general or principal prosecuting officer of each state submit detailed annual reports to the Administrative Office of the United States Courts on all electronic surveillance. This data is compiled and then transmitted in public reports to the Congress.¹⁹ Even more stringent reporting requirements are present in the New Jersey Act.

The Judges of the Superior Court authorized to issue wiretap orders are required to report directly to the Administrative Director of the Courts. The Attorney General must receive reports from each of the county prosecutors. This data, together with information on electronic surveillance conducted by the Attorney General's Office, is compiled by the Attorney General and submitted to the Administrative Director of the Courts. Both the Attorney General and the Chief Justice of New Jersey are required to submit to the Governor and the Legislature annual reports on the operation of the New Jersey Act. In addition, the Chief Justice and the Attorney General are authorized to provide the Governor and the Legislature with appropriate recommendations for changes or improvements in the Act to advance the legislative purpose "and protect individual liberties."²⁰

These statutory provisions have proved to be beneficial in two major respects. First they have provided the public and the Legislature with concrete data to evaluate the Act and to consider how it may be improved. Suggested amendments in this regard may be incorporated into the Act at its expiration and prior to reenactment. The present version of the Act will remain in effect until July 1, 1978. Secondly, the Attorney General's office can present recommendations of the law enforcement community respecting developments in electronic surveillance techniques which will permit further curtailments in the intensity of surveillance without crippling the police in society's struggle against organized crime.

For example, in 1975 the Attorney General's Office submitted to the Legislature a number of proposed revisions in the Act to decrease the amount of eavesdropping and to accomplish the statutory goal of minimizing and eliminating the quantity of non-incriminating conversations intercepted.²¹ The Legislature specifically adopted the recommendation that the initial period of the wiretap order not exceed 20 days.²² This was in accord with administrative practice developed at the statewide level. The Legislature also enacted another law enforcement proposal requiring that all judicial orders authorizing the interception of conversations mandate that reasonable efforts be made by the police to reduce the hours of interception authorized in the order.²³

18. *N.J.S.A.* 52:17B-97 *et seq.*

19. 18 *U.S.C.A.* §2519.

20. *N.J.S.A.* 2A:156A-23

21. See *Hyland & Martinez, supra.*

22. *N.J.S.A.* 2A:156A-12(f) (as amended by L. 1975, c. 131, §8).

23. *Id.*

Another administrative procedure designed to safeguard Fourth Amendment rights by minimizing electronic surveillance is contained in the intricate process that must precede any wiretap request from the Attorney General's Office. Two separate chains of command are involved.

The first chain is the State Police. Initially, a State Police investigator will analyze the information to determine if electronic surveillance would be justified under the Act. If this officer makes an affirmative determination he submits a written request to his unit leader who subjects the request to an independent evaluation under the statutory criteria. If this second officer also determines that the surveillance is warranted, the application is forwarded to State Police Division Headquarters where the application is again screened by the Captain of the Intelligence Bureau and the Major in the Criminal Investigation Section. These officers, the third and fourth in the chain, each make independent determinations that the application fulfills the statutory requirements of probable cause, particularization and reasonable exhaustion of alternative investigative techniques. In addition, these officers must make strategic investigative decisions regarding the relative value of the surveillance, the likelihood of success and the availability of manpower resources to effectively conduct the wiretap or microphone surveillance.

The second chain of command consists of attorneys in the Division of Criminal Justice. The deputy attorney general assigned to the case receives the state police application for electronic surveillance and determines if the statutory criteria have been met. Subsequently, this same judgment must be independently made by the relevant section chief in the Division of Criminal Justice, the Division's Deputy Director in charge of Investigations and the Director of the Division. Each of these two chains consists of at least four steps and at each step a professional public servant makes an independent determination. If at any point that evaluation is negative, the application for electronic surveillance is deemed to be rejected. Only after the application has passed through each chain of command is it submitted to the Attorney General for his own independent evaluation.²⁴

This painstaking procedure was administratively developed to safeguard the privacy rights of our citizens. It goes far beyond the strict requirements of even New Jersey's rigorous statutory scheme and reflects state law enforcement's sensitivity to the competing values implicated in electronic surveillance.

As a result of this systemitized care in screening wiretap applications every application submitted to the courts by the Attorney General's Office in the past year was granted. Indeed, the procedures employed by the State Police and the Division of Criminal Justice have been so successful that in the eight years since the adoption of New Jersey's Act, there has not been a single successful suppression motion against a state surveillance. A few suppression motions have been granted by trial courts. In each instance the courts were reversed on appeal.²⁵ This is an almost unparalleled record of devotion to accommodating civil liberties with effective law enforcement techniques.

Moreover, there has evolved a greater selectivity in the utilization of electronic surveillance by State officials. The largest number of authorized installations occurred in 1971. In that year state officials conducted 86 instances of electronic surveillance. From that time a downward trend developed. The number of applications has stabilized over the last two years. In 1975 there were 44 authorized installations and last year, 1976, there were 45 installations. Any increase in the overall New Jersey statistics is the result of the use of electronic surveillance by local prosecutors, although the statewide total actually declined from 196 in 1975 to 172 in 1976.

24. N.J.S.A. 2A:156A-8.

25. See, e.g., *State v. Luciano*, 148 N.J. Super. 551 (App. Div. 1977).

Electronic surveillance has been an almost unqualified success in prosecuting syndicated offenses. Recently, an article appeared in a large daily newspaper, which reported that the Attorney General's Office had only an 8% conviction rate in cases where electronic surveillance evidence had been obtained. This 8% figure constitutes a gross statistical misrepresentation. It was based on a comparison of 1976 conviction figures with the total number of arrests and indictments obtained as a result of electronic surveillance conducted in 1976. The majority of the cases generated by the 1976 wiretaps will not be disposed of on the merits until late 1977 or 1978 since the normal incidents of due process afforded defendants, such as discovery, pretrial motions and trial preparation will not be completed until then.

In fact, far from only an 8% conviction rate, the exact opposite is true. In cases disposed of on the merits where evidence was obtained through electronic surveillance the Division of Criminal Justice has an almost 100% conviction rate. No major prosecution has been lost by the Division where that prosecution was based on wiretap or microphone surveillance evidence. This record of success is not surprising given the devastating nature of such evidence. As a result, a high percentage of these prosecutions result in guilty pleas. This has desirable collateral consequences. Prosecutorial and judicial resources are freed for the trial of other offenses so that speedy trial rights are assured and the swiftness of justice is enhanced.

Some observers have been concerned about possible Fourth Amendment intrusions arising from court authorized electronic surveillance. These concerns have stemmed from the risk that great numbers of conversations would be intercepted unnecessarily to obtain only a small amount of incriminating evidence. Nevertheless, as state officials have become more experienced in the use of electronic surveillance techniques, their efficiency has increased. By utilizing careful administrative procedures and closely adhering to the strengthened minimization standards set forth in the 1975 amendments, considerable advances have been achieved. In 1974, the last year of operation under the original 1968 act, approximately 35% of all conversations intercepted by state officials contained incriminating material. The percentage of incriminating conversations intercepted increased to 43% in 1975 under the new act. In 1976, over 50% of all intercepted conversations provided evidence of criminal activity. These statistics reflect the growing technical sophistication by state officials and their increased sensitivity to the need for protecting Fourth Amendment values. As a result, privacy rights have been safeguarded and precious police resources have been preserved for the battle against the encroachments of organized crime.

The excellent provisions contained in our wiretap statute, coupled with administrative dedication to effectuating the legislative purposes has enabled state officials to safeguard the public's expectations of privacy. Indeed, as noted, some of the most stringent provisions in the Act were supported and recommended by law enforcement agencies. This process will not cease. Statewide law enforcement officials will continue to recommend appropriate statutory revisions to minimize the number of interceptions and maximize the efficiency of electronic surveillance installations. More importantly, the efforts to achieve various administrative refinements will also continue. If new techniques prove empirically successful they too will be the subject of recommended amendments to improve the New Jersey Act.

In the area of electronic surveillance, New Jersey's law enforcement agencies have been in the vanguard of those who seek to assure that organized crime will be combatted without infringements on the privacy of our citizens. The good faith sensitivity to Fourth Amendment rights felt by our law enforcement personnel has been manifested in their legislative initiatives and carefully restrained administrative procedures. The sovereign power of government rests with the people of New Jersey. Their public officials are responsible to them. These officials have demonstrated the depth of their commitment to the prudently circumscribed use of electronic surveillance as a tool not to invade, but rather to protect, the people's rights.



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