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## Constitutional Law--Electronic Eavesdropping and The Right to Privacy

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## CASE COMMENTS

**Constitutional Law—Electronic Eavesdropping and  
The Right To Privacy**

*D* was convicted of transmitting wagering information by telephone in interstate commerce in violation of federal law. Evidence of *D*'s side of these telephone conversations, obtained by federal agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which *D* had made the calls, was introduced at the trial over *D*'s objections. *Held*, judgment reversed. The eavesdropping constituted a search and seizure since it violated the privacy upon which *D* justifiably relied when using the telephone booth and, therefore, a court order authorizing such eavesdropping was necessary. *Katz v. United States*, 389 U.S. 347 (1967).

This decision represents one of the advancing steps in the protection of what has been called "the right to privacy." The idea of such a right first emerged in 1890 in a now-famous law review article co-authored by Justice Brandeis.<sup>1</sup> Since that time this right has been defined and protected in both criminal and civil areas<sup>2</sup> and is recognized in the federal courts and in most state courts.<sup>3</sup>

The concept of a "right to privacy" is derived from the fourth amendment, which sets forth the requirements for searches and seizures of the individual and his property by the government.<sup>4</sup> From this it has been established that a search warrant is needed to physically search and seize personal effects of an individual,<sup>5</sup> and any conduct which circumvents this requirement is unconstitutional

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<sup>1</sup> Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>2</sup> W. PROSSER, TORTS 829 (3d ed. 1964).

<sup>3</sup> To the effect that West Virginia recognizes the right to privacy, see *Sutherland v. Kroger Co.*, 144 W. Va. 673, 110 S.E.2d 716 (1959); *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958).

<sup>4</sup> U.S. CONST. amend. IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>5</sup> *Ex parte Jackson*, 96 U.S. 727 (1877). As to administrative searches, see 70 W. VA. L. REV. 74 (1967).

*per se*.<sup>6</sup> A corollary to this requirement is the federal exclusionary rule which excludes from federal courts any evidence obtained in violation of the fourth amendment.<sup>7</sup> This exclusionary rule was later extended and now applies to the states.<sup>8</sup> The protection afforded by the fourth amendment and the exclusionary rule not only extends to individuals but also to corporations and their officers.<sup>9</sup> As to the individual, he is not only protected in his house,<sup>10</sup> but also in his office,<sup>11</sup> store,<sup>12</sup> hotel room,<sup>13</sup> automobile,<sup>14</sup> and taxi,<sup>15</sup> but apparently not in jail.<sup>16</sup>

The requirement of a search warrant may be dispensed with where the search is made incident to a lawful arrest,<sup>17</sup> but the search must be limited to the immediate area of the arrest.<sup>18</sup> The requirement may also be waived by the individual either expressly<sup>19</sup> or impliedly.<sup>20</sup>

The constitutionality of wiretapping was established in the 1928 case of *Olmstead v. United States*.<sup>21</sup> In that case telephone wires had been tapped in the basement of an office building and on a public street. The Supreme Court held the evidence so obtained admissible, reasoning that the fourth amendment did not prohibit

<sup>6</sup> *Stoner v. California*, 376 U.S. 483 (1964); *Rios v. United States*, 364 U.S. 253 (1960); *Jones v. United States*, 357 U.S. 493 (1958); *United States v. Jeffers*, 342 U.S. 48 (1951); *Agnello v. United States*, 269 U.S. 20 (1925); *Boyd v. United States*, 116 U.S. 616 (1885).

<sup>7</sup> *Weeks v. United States*, 232 U.S. 383 (1914); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 Nw. U. L. Rev. 65 (1957).

<sup>8</sup> *Stanford v. Texas*, 379 U.S. 476 (1965); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>9</sup> *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

<sup>10</sup> U.S. CONST. amend. IV.

<sup>11</sup> *Gouled v. United States*, 255 U.S. 298 (1921).

<sup>12</sup> *Davies v. United States*, 328 U.S. 582 (1946).

<sup>13</sup> *United States v. Jeffers*, 342 U.S. 48 (1951).

<sup>14</sup> *Henry v. United States*, 361 U.S. 98 (1959).

<sup>15</sup> *Rios v. United States*, 364 U.S. 253 (1960).

<sup>16</sup> *Lanza v. New York*, 370 U.S. 139 (1962).

<sup>17</sup> *Stoner v. California*, 376 U.S. 483 (1964); *Ker v. California*, 374 U.S. 23 (1963); *Draper v. United States*, 358 U.S. 307 (1959); *United States v. Rabinowitz*, 339 U.S. 56 (1950); *United States v. Lee*, 274 U.S. 559 (1927).

<sup>18</sup> *Beck v. Ohio*, 379 U.S. 89 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951); *Agnello v. United States*, 269 U.S. 20 (1925). As to police liability in unreasonable searches and seizures, see Note, 16 CLEV.-MAR. L. REV. 428 (1967).

<sup>19</sup> *Osborn v. United States*, 385 U.S. 323 (1966); *Lopez v. United States*, 373 U.S. 427 (1963).

<sup>20</sup> *Zap v. United States*, 328 U.S. 624 (1946).

<sup>21</sup> 277 U.S. 438 (1928). For the historical development of the law since that time, see Annot., 11 A.L.R.3d 1296 (1967); Sullivan, *Wire-Tapping and Eavesdropping: A Review of the Current Law*, 18 *Hast. L. J.* 59 (1966); Note, *Eavesdropping Orders and the Fourth Amendment*, 66 *COLUM. L. REV.* 355 (1966).

hearing or sight.<sup>22</sup> Subsequently, Congress made wiretapping illegal.<sup>23</sup> With the advent of sophisticated electronic devices, it became apparent that one need not tap telephone wires in order to intercept conversations. In *Goldman v. United States*<sup>24</sup> agents applied a "detectophone" to the wall of an adjoining room whereby they were able to overhear petitioner's telephone conversations. The Supreme Court held that this overhearing did not constitute "interception" of telephone messages prohibited by the statute.<sup>25</sup> The Court reasoned that no trespass had been committed in obtaining the evidence so as to render the evidence inadmissible.<sup>26</sup>

The trespass test was to be used much by the Court in later years. It was applied in 1961 in *Silverman v. United States*<sup>27</sup> where agents had used a "spike mike" which penetrated petitioner's wall and contacted the heating ducts of his dwelling making the heating system a sounding board. This was held to be an unauthorized trespass thereby rendering the evidence so obtained inadmissible. It was later held that a trespass, no matter how minute and insignificant, has this effect.<sup>28</sup>

Newer electronic eavesdropping devices requiring no penetration in order to accomplish their mission, plus the fact that the trespass test failed in many instances, gave rise to a different concept of protection — the constitutionally protected area theory.<sup>29</sup> Under this theory whether evidence obtained by electronic eavesdropping is in violation of the fourth amendment depends on whether the individual is in a constitutionally protected area.<sup>30</sup> In *United States v. Stone*,<sup>31</sup> a case very similar to the principal case, agents placed an electronic transmitter under the base of a public telephone whereby they were able to overhear defendant's side of the conversation. The court held that the telephone booth was a protected area, and thus the evidence was inadmissible. Where

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<sup>22</sup> *Olmstead v. United States*, 277 U.S. 438, 465 (1928). For a comment on this case, see 35 W. VA. L. Q. 93 (1929).

<sup>23</sup> Communications Act of 1934, 47 U.S.C. § 605 (1964).

<sup>24</sup> 316 U.S. 129 (1942).

<sup>25</sup> *Id.* at 133. The statute referred to is the Communications Act of 1934, 47 U.S.C. § 605 (1964).

<sup>26</sup> *Id.* at 135.

<sup>27</sup> 365 U.S. 505 (1961).

<sup>28</sup> *Clinton v. Virginia*, 377 U.S. 158 (1964) (thumb tack penetrating into wall).

<sup>29</sup> 28 OHIO ST. L. REV. 527, 530 (1967).

<sup>30</sup> *Lanza v. New York*, 370 U.S. 139 (1962).

<sup>31</sup> 232 F. Supp. 396 (N.D. Tex. 1964).

the suspect is in a constitutionally protected area, it was later held in *Osborn v. United States*<sup>32</sup> that evidence obtained by eavesdropping done pursuant to a court order is admissible. The Supreme Court thus recognized that eavesdropping could be authorized.<sup>33</sup> The question as to how authorized eavesdropping might be done was left open.

Some states have statutes regulating wiretapping and electronic eavesdropping, and many writers feel that it is at the state level that regulation should be accomplished.<sup>34</sup> Perhaps the most well known of such statutes is that of New York.<sup>35</sup> Under this statute a procedure is set forth like that contained in the fourth amendment. On its face this seemed to be the best solution to the problem, but the Supreme Court disagreed. In *Berger v. New York*,<sup>36</sup> the statute was invalidated as being unconstitutional. The Court set forth four main reasons for invalidating the statute: (1) it contained no provision for particularity as to the evidence to be obtained; (2) it allowed a series of intrusions with only one showing of probable cause; (3) it did not provide for a termination date once the conversation had been seized; and (4) it permitted unconsented entry without requiring a showing of special facts to justify the elimination of consent.<sup>37</sup> By its decision, the Court held that eavesdropping which is unconstitutional is not made valid by a court order when the statute authorizing the order is too broad.<sup>38</sup> Thus *Berger* intimated a solution to the problem—a court order with tight procedural safeguards.<sup>39</sup> Previous rules were put aside as well as state statutes, and in place of them was left the skeleton of a new

<sup>32</sup> 385 U.S. 323 (1966).

<sup>33</sup> The suggestion for authorizing eavesdropping by warrant appears to have been first made by Justice Brennan in *Lopez v. United States*, 373 U.S. 427 (1963) (*dissenting opinion*).

<sup>34</sup> Runft, *The Electronic Eavesdropping Threat to the Right of Privacy: Can the States Help?*, 3 IDAHO L. REV. 13 (1966); Sullivan, *Wire-Tapping and Eavesdropping: A Review of the Current Law*, 18 HAST. L. J. 59 (1966); Note, *Electronic Surveillance and the Right of Privacy*, 27 MONT. L. REV. 173 (1966).

<sup>35</sup> N.Y. CODE CRIM. PROC. § 813-a (McKinney 1958). In pertinent part:

An ex parte order for eavesdropping . . . may be issued by any justice of the supreme court . . . upon oath or affirmation . . . that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications . . . are to be overheard or recorded and the purpose thereof.

<sup>36</sup> 388 U.S. 41 (1967).

<sup>37</sup> *Id.*

<sup>38</sup> Greenwalt, *Wiretapping and Bugging: Striking a Balance Between Privacy and Law Enforcement*, 72 CASE & COM. 3, 6 (Sept.-Oct. 1967).

<sup>39</sup> *Id.*

constitutional rule much like that of the fourth amendment, only more narrowly defined.<sup>40</sup>

The logical conclusion to the reasoning set forth in *Berger* is embodied in the principal case. For the first time since 1928 and *Olmstead* a workable rule has been established which appears to provide adequate protection of the individual's fourth amendment rights in the area of electronic eavesdropping.<sup>41</sup> The *Katz* rule is that a court order, such as that in *Osborn*, may be used if the officers wishing to obtain eavesdrop evidence " . . . present their estimate of probable cause for detached scrutiny by a neutral magistrate."<sup>42</sup> Then, while conducting their search, they must " . . . observe precise limits established in advance by [the] specific court order."<sup>43</sup> Finally, after such a search, they must " . . . notify the authorizing magistrate in detail of all that [has] been seized."<sup>44</sup>

By the operation of this rule, the suspect's fourth amendment rights are protected by the neutral magistrate and the strict court order. In addition, the rule does not require notice of the intended eavesdropping to the suspect, since such notification would largely destroy the possibility of obtaining the evidence. This principle has been recognized in the area of conventional search warrants.<sup>45</sup>

In arriving at its decision, the majority in the principal case discarded the "trespass" and "constitutionally protected area" formulations reasoning that ". . . the fourth amendment protects people, not places."<sup>46</sup> The important distinction to be made is that it matters not where a person is at a particular time, but only whether he wishes to preserve his activity as private.<sup>47</sup> This is not to say that a person is protected if he exposes this activity to the public;<sup>48</sup> he must take steps to preserve it as private. In the principal case petitioner made his calls from a telephone booth to exclude the

<sup>40</sup> The decision had narrowed the scope of the court order which was upheld in *Osborn v. United States*, 385 U.S. 323 (1966).

<sup>41</sup> The Court in the principal case discounts the idea of a general constitutional "right to privacy" under the fourth amendment. *Katz v. United States*, 389 U.S. 347, 350 (1967).

<sup>42</sup> *Id.* at 356.

<sup>43</sup> *Id.* at 356. The Court conceded that the surveillance as conducted was limited enough to have been permitted by court order. *Id.* at 354.

<sup>44</sup> *Id.* at 356.

<sup>45</sup> *Ker v. California*, 374 U.S. 23 (1963).

<sup>46</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967).

<sup>47</sup> *Id.*

<sup>48</sup> *Lewis v. United States*, 385 U.S. 206 (1966).

“uninvited ear,” not the “intruding eye.”<sup>49</sup> He wished to keep what he *said* private, and was justified in assuming that this would be the case.<sup>50</sup> Therefore, he was entitled to the protection afforded by the fourth amendment—freedom from unreasonable searches and seizures.<sup>51</sup>

A question left open in this case, and one which may prove to be important later, is raised in the Court’s footnote 23. In this footnote the Court observed that the present decision was not concerned with eavesdropping in cases involving national security. In a concurring opinion,<sup>52</sup> Justice White expressed the view that the warrant procedure should be dispensed with in cases of national security if eavesdropping is authorized by the President or Attorney General, stating for his only reason that successive presidents have authorized such surveillance to protect the security of the nation.<sup>53</sup>

In rebuttal to this, Justice Douglas in a concurring opinion,<sup>54</sup> in which he was joined by Justice Brennan, raised the point that the President and Attorney General, because of their positions, are not detached from the problem of national security, and thus do not qualify as neutral magistrates. The fourth amendment draws no distinction between substantive offenses, and, therefore, none should be drawn here.<sup>55</sup> The point is well taken, and the argument convincing, and may prove to be the better view. At a time when international espionage is an acute problem, the question left open by the *Katz* case may call for an early answer.

*John Charles Lobert*

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### Constitutional Law—Group Legal Services— Unauthorized Practice of Law

The Illinois State Bar Association sought to have a labor union enjoin from the practice of employing licensed attorneys on a salary basis to prosecute workmen’s compensation claims for any

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<sup>49</sup> *Katz v. United States*, 389 U.S. 347, 352 (1967).

<sup>50</sup> *Id.* at 352.

<sup>51</sup> *Id.* at 359.

<sup>52</sup> *Id.* at 362 (concurring opinion).

<sup>53</sup> *Id.* at 364 (concurring opinion).

<sup>54</sup> *Id.* at 359 (concurring opinion).

<sup>55</sup> *Id.* at 360 (concurring opinion).