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Constitutional Law--Search and Seizure--Telecommunications

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CASE COMMENTS

Constitutional Law—Search and Seizure—

Telecommunications

Ds were indicted for violations of the District of Columbia Code provisions proscribing gambling. Police inserted an antenna spike into a party wall and with the aid of this device listened to Ds' conversations. On the basis of the conversations overheard warrants were issued for Ds arrest and for search of their premises. Their arrest and search of the premises followed. During the trial Ds moved to suppress the evidence thus obtained. They contended that this method of obtaining information constituted unlawful "search and seizure" as proscribed by the fourth amendment to the United States Constitution and also interference as proscribed in the Communications Act of 1934. The district court denied the motion and the jury found Ds guilty of gambling. Held, in affirming the convictions, that the actions of officers did not constitute unlawful "search and seizure" nor constitute an interference with any communications system. Silverman v. United States, 275 F. 2d 173 (D.C. Cir. 1960).

The problem raised by this case is one which has led to a great deal of controversy and speculation and this decision only adds fuel to the fire. This comment will attempt to present briefly the evolution of the law relating thereto.

With the advent of wire tapping as a method of obtaining evidence against accused or suspected persons, the legal aspects of eavesdropping were magnified. Its legality has turned on the interpretation of the fourth amendment, which protects against unreasonable searches and seizures.

Interpretations of the fourth amendment limitations in this area have special significance in West Virginia in light of past statements by the West Virginia Supreme Court. The court stated that where parallel provisions of the United States Constitution are involved, construction should be in harmony with decisions of the United States Supreme Court. State v. Bruner, 143 W. Va. 755, 105 S.E. 2d 140 (1958), State v. Andrews, 91 W. Va. 720, 114 S.E. 257 (1922).

The constitutional protection against wire tapping was first raised in Olmstead v. United States, 277 U.S. 438 (1927), which involved the use of wire tapping devices to obtain evidence against persons conspiring to violate the Prohibition Act. There the Court held that wire tapping did not constitute an unlawful search and seizure as
contemplated by the framers of the Constitution. The majority of the Court did not feel, in the interest of liberty, that the fourth amendment should be enlarged beyond the possible practical meaning of "persons, houses, papers, and effects" or so applying "searches and seizures" as to forbid hearing and sight.

The literal interpretation of the fourth amendment has been the basis of much criticism, including the dissenting opinions in the Olmstead case in which four Justices, including Mr. Justice Holmes and Mr. Justice Brandeis, expressed the view that the fourth amendment must be interpreted in light of present facts and things to come in the future.

With the enactment of the Communications Act of 1934, 47 U.S.C. § 605 (1946), the evolution of the law of eavesdropping continued. This act, although passed for other purposes, was used by the courts to declare wire tapping illegal. The Court held in Nardone v. United States, 302 U.S. 379 (1937), that the act forbids anyone, unless authorized by the sender, to intercept a telephone message or to divulge the contents thereof. To recite the message in a court of law was held to be in direct violation of the act. This would seem to have solved the wire tapping problem but it has in fact led to more problems. State officers were disposed to disregard this act and turn the evidence over to federal officials. See Comment, 63 W. VA. L. Rev. 56 (1960).

With the progress of science, a new method of obtaining evidence came before the Court in Goldman v. United States, 316 U.S. 129 (1942). Here petitioners, who were conspiring to violate provisions of the Bankruptcy Act, fell prey to the inventions of science in the form of a detectaphone, a small electronic device which, with the aid of earphones, when placed against a partition wall, can pick up conversations in an adjoining room. With the aid of this device federal officers obtained evidence, including a telephone conversation with which the petitioners were convicted of conspiracy. The Court held that the use of a detectaphone was not a violation of the fourth amendment, relying on Olmstead v. United States, supra, and the literal interpretation of the fourth amendment set forth therein. The Court also held that the overhearing of the telephone conversation did not violate the Communications Act of 1934, stating: "What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission."
In the *Goldman* case four Justices dissented again. Mr. Justice Murphy, commenting on the literal interpretation of the fourth amendment, stated that this historical provision should receive a more elastic and liberal construction so as to serve the needs and manners of each succeeding generation. The four dissenting Justices were again dissatisfied with the literal interpretation of the fourth amendment as set forth in the *Olmstead* case. Mr. Justice Murphy indicated his readiness to overrule the *Olmstead* case.

The instant case is another example of the literal interpretation of the fourth amendment. In this interpretation of the fourth amendment insertion of the antenna spike into the party wall did not constitute an unlawful search and seizure because it did not constitute a trespass to the property or persons of *Ds.* This case is squarely in line with the *Goldman* case and the reasoning therein. In the instant case there is no violation of the Communications Act of 1934. As in the *Goldman* case, the overhearing of the telephone calls did not interfere with the transmission of the calls and therefore there was no violation. The one difference in this case and the *Goldman* case is the method used to obtain the evidence. As long as eavesdropping does not involve an unauthorized physical entry upon the premises of another, the court appears to find no conflict with the fourth amendment.

Although the instant case follows in line with earlier cases, the eavesdropping problem may not be fully solved. In none of the cases decided in this area has there been a unanimous decision. In the instant case there was a dissenting opinion which in substance stated that the action here may not be in violation of the fourth amendment but it does violate our fundamental concept of ordered liberty. The pattern of the eavesdropping cases has been shaped through the years, but as science develops new devices to invade privacy, without a trespass in the traditional sense, the fine balance of judicial reaction may lean away from the literal interpretation of the search and seizure position.

*William Warren Upton*