Land & Water Law Review

Volume 3 | Issue 2 Article 15

1968

Constitutional Law - Search and Seizure - Electronic Recording and Listening Devices - Katz v. United States

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CONSTITUTIONAL LAW—Search and Seizure—Electronic Recording and Listening Devices. Katz v. United States, 88 S. Ct. 507 (1967).

Katz was tried and convicted in the United States District Court, Southern District of California, for transmitting wagering information via telephone in violation of a federal statute.[1] The government's primary evidence consisted of recordings of the defendant's end of telephone conversations procured by agents of the Federal Bureau of Investigation. The officers accomplished their surveillance by attaching a listening and recording device to the outside of the public telephone booth from which the defendant's calls emanated. An appeal was taken, Katz contending that the recordings had been obtained in violation of the fourth amendment. The Court of Appeals affirmed, rejecting appellant's contention because there was no physical encroachment of the area utilized by him.

The United States Supreme Court granted certiorari. The majority, in an opinion written by Mr. Justice Stewart, declined to subscribe to the concept of constitutionally protected areas and further denied the necessity of a physical penetration as a component of an illegal search and seizure. In reversing, the Supreme Court held that the use of the recording and listening device by the agents without prior approval by a judge or magistrate violated the privacy upon which the petitioner justifiably relied while occupying and utilizing the telephone booth, and was per se an unreasonable search and seizure under the Fourth Amendment.

As early as 1886,[2] American jurists recognized that privacy was an individual right worthy of protection. In 1890, Samuel D. Warren and Louis D. Brandeis propounded their monumental chronology of common law recognition and protection of the individual's person and property, concluding, "now the right to life has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures

1. 18 U.S.C. § 1084 (1964). "(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both."
2. Boyd v. United States, 116 U.S. 616 (1886).

the exercise of extensive civil privileges; and the term 'property' has grown to compromise every form of possession—intangible as well as tangible."[3] Now, advocated these eminent scholars, there had arrived a time which demanded that steps be taken "for securing to the individual . . . the right 'to be let alone.' "[4] Thereafter, in the case of *Weeks v. United States*[5] the Supreme Court of the United States construed the fourth amendment as including within its penumbra this 'right of privacy,' a right not explicitly enumerated in the amendment.

However, that electronic eavesdropping[6] was a species of search and seizure encompassed by the scope of the fourth amendment, or that such surveillance violated the individual's right of privacy, were propositions rejected by a 5-4 majority in *Olmstead v. United States.*[7] In that case, federal officers procured evidence of Prohibition violations by tapping telephone transmission lines. The Court was unable to perceive a violation of the fourth amendment, because there was no physical trespass, and hence no "search."[8] Further, there was no "seizure" because no material thing, no tangible object, was confiscated.[9] Although the form of wiretapping employed in *Olmstead* was later prohibited totally by the Federal Communications Act, Section 605,[11] other forms of electronic eavesdropping continued to be the source of a wide divergence in opinion among the members of the Court.

The material-object rationale of *Olmstead* was repudiated by the Court in *Irvine v. California.*[12] The Court held that

3. Warren & Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193, 193 (1890).
4. *Id.* at 195.
5. 232 U.S. 383 (1914).
6. Although in its primary form, electronic eavesdropping was interpreted as including wiretapping, it is necessary to understand that with development of sensitive detection devices, the two terms became indicative of two totally different means of surveillance. Electronic eavesdropping as presently connoted requires no physical terminal between the listening device and an electronic transmission line. Consequently, although wiretapping has been legislatively prohibited, electronic eavesdropping has so far received no Congressional attention in the form of legislation.
7. 277 U.S. 438 (1928).
8. *Id.* at 464.
9. *Id.* at 464.
10. For a definitive differentiation between "wiretapping" and "electronic eavesdropping" see Hearings Before the Sub-Committee on Constitutional Rights of the Committee on the Judiciary United States Senate, 86th Cong., 1st Sess., Pt. 5 at 1822-23 (1959). Generally, the distinguishing characteristic is lack of or presence of wiring or physical contact with any object of electronic transmission.
11. Communications Act of 1934, Ch. 652, 47 U.S.C. § 605 (1964).
12. 347 U.S. 128 (1954).

conversations, however intangible they might be, could indeed be seized. The conversations subjected to surveillance in that case were held to be seized in contravention of the spirit and intendment of the fourth amendment.[13] Hence, a substantial premise of the *Olmstead* decision was vitiated.

But the requirement of a physical trespass persisted, despite electronic and technological developments which vindicated Justice Brandeis' warning in his *Olmstead* dissent. He had admonished:

> Clauses guaranteeing to the individual protection against specific abuses of power must have . . . a capacity of adaptation to a changing world. The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.[14]

Thus, despite the accuracy of those premonitions, in *Goldman v. United States*[15] the Court held admissible evidence of conversations obtained by placing an electronic device against the outside of a wall. And in *On Lee v. United States,*[16] incriminating conversations were procured through the agency of a tiny transistor hidden on an undercover agent. The Court held that this did not amount to an unlawful invasion of privacy, because the eavesdropper was an invitee and hence there was no physical trespass. In the recent case of *Silverman v. United States,*[17] the Court purported to eliminate the requirement of the traditional trespass. Although evidence obtained by a listening device inserted into the defendant's heating system was held inadmissible, the Court denied that its decision was based on a "technical trespass under the local property law relating to party walls,"[18] but pointed instead to the existence of a "physical penetration."[19] The distinction was tenuous, and unfortunately the Court retained the requirement of some physical relationship

13. *Id.*
14. 277 U.S. 438, 474 (1928). (Dissenting opinion).
15. 316 U.S. 129 (1942).
16. 343 U.S. 747 (1952).
17. 365 U.S. 505 (1961).
18. *Id.* at 511.
19. *Id.* at 509.

between the premises which the defendant occupies and the listening device. In the principal case the anachronistic requirement of a physical intrusion has been discarded, and the Court has expressed a view which is certainly more compatible with contemporary concepts of individual privacy. *Katz'* rationale provides the only possibly adequate protection of privacy, a right which becomes increasingly susceptible to intrusion because of astronomical advances in technological development. There presently exists a vast array of electronic devices which are completely efficient despite the absense the slightest proximity to the area being monitored.[20]

In holding the recordings inadmissible the majority stated, "the fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance."[21] The opinion explicitly overruled *Olmstead* and *Goldman,*[22] and rendered the tenuous premise of the *Silverman* holding insignificant. It eliminated a glaring fallacy which persisted in cases from *Olmstead* to *Silverman,* a fallacy decried by Mr. Justice Douglas concurring in *Silverman*: "An electronic device on the outside wall of a house is a permissible invasion of privacy . . . while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other."[23] That an unauthorized physical penetration of the premise is irrelevant is a recognition long overdue.

Katz additionally vitiates the concept of the "constitutionally protected area" as a touchstone for solutions to fourth amendment controversies. As interpreted by the Court in the present case, the amendment protects "people, not places."[24] The test propounded is a subjective one: Was there a justifiable reliance on existence of privacy in an isolated situation? Whether the area in which the situation evolves is public or private, the legality of the eavesdrop centers on the victim's reliance.[25] Where such justifiable reliance is found to exist, any unauthorized surveillance will be illegal. Thus, the existence or absence of a physical intrusion will be

20. For a summary of the array of available devices, *see* DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS, 330 (1959).
21. 88 S. Ct. 507, 510 (1967).
22. *Id.* at 512.
23. Silverman v. United States, 365 U.S. 505, 512 (1961). (Concurring opinion).
24. 88 S. Ct. 507, 510 (1967).
25. *Id.* at 511, 512.

immaterial, because the scope of protection is no longer a function of physical delimitation. Rather, the physical area involved is an element to be considered in determining the reasonableness of the victim's reliance on privacy. Only by approaching the issue as the Court has in *Katz* can a determination consistent with the modern concept of an intrusion be accomplished. Intrusions no longer require forcible physical entries, but are as completely accomplished by employment of electronic gadgets whose penetrations are intangible. Without the application given it in the present case, the fourth amendment was destined to be relegated to impotence, an unfortunate commentary on the inability of the judiciary to adapt to rapid change. By extending the coverage of the fourth amendment to such situations as the present, the Court has secured to the individual freedom to "open his collar . . . and give vent to his own particular daydreams, his muttering and snatches of crazy song, his bursts of obscenity and afflatus of glory."[26]

The holding in the present case was the ultimate conclusion to a group of cases decided during the 1966 term. In all of those cases it was apparent that the Court had developed a more concrete and consistent attitude about the limitations to which electronic eavesdropping should be subjected. Yet, it was also apparent that electronic search and seizure was considered essential to police functions and was therefor accorded favorable consideration. Although the holdings of the cases were based upon distinguishable fact situations and were contrary to the holding in *Katz* each contained intimations of the holding which would result when the desirable case arose. In *Hoffa v. United States*[27] an informer named Partin related to federal agents his account of the Teamster President's attempt to rig a jury verdict. The informant had obtained the information by establishing himself as one of Hoffa's confidants. There was controversy whether the informant was a spy placed among Hoffa's coherts by government agents or a voluntary informer. The Court found resolution of this issue unnecessary, and concluded that the informant's elucidations were correctly admitted by the trial court as evidence. Although it was agreed that Hoffa's hotel room

26. CAHN, THE SENSE OF INJUSTICE 151 (1949).
27. 385 U.S. 293 (1966).

was a constitutionally protected area, and that the oral statements made therein were also protected, a majority opined that the "fundamental nature and scope" of the fourth amendment protects only "the security a man *relies upon* when he places himself within a constitutionally protected area."[28] Because Hoffa had invited the informer into his hotel suite, and had voluntarily conversed with him, he was "not relying on the security of the hotel room; he was relying upon his misplaced confidence that Partin would not reveal his wrong doing."[29] The reference to a constitutionally protected area in *Hoffa* is now immaterial in light of *Katz,* but the basic premise of that decision, reliance upon privacy, is consistent with *Katz.*

Osborn v. United States[30] arose out of a later Hoffa trial. One Vick was persuaded by Hoffa's attorney to investigate prospective jurors in an attempt to find an individual amenable to tampering. Vick had previously agreed to report to the government any illegal activities which might transpire in his association with the attorney. Pursuant to a warrant issued by a district court judge, Vick employed a tiny microphone recorder concealed on his person to obtain several incriminating statements in reference to the attorney's attempts to rig a jury. The district court authorization was upheld by the Supreme Court, and the recorded evidence was held admissible as evidence in the attorney's criminal trial. Again in this case there was an invitee, however devious his purpose, and a voluntary statement by the defendant, each indicative of an unjustifiable reliance on privacy, if indeed there was a reliance at all. This clearly foreshadowed the holding in the *Katz* decision that electronic surveillance conducted according to fourth amendment requirements would be legal, a ramification discussed later.

In *Lewis v. United States,*[31] a federal narcotics agent deviously persuaded Lewis to engage in a transaction for the sale and purchase of narcotics, the fruits of the transaction subsequently being introduced as evidence at the defendant's trial. To the petitioner's contention that the

28. *Id.* at 301.
29. *Id.* at 302.
30. 385 U.S. 323 (1966).
31. 385 U.S. 206 (1966).

scheme violated his fourth amendment rights, the Court responded, "it presents no question of the invasion of the [right of] . . . privacy . . .; the only statements repeated were those that were willingly made to the agent and the only things taken were the packets of marihuana (sic) voluntarily transferred to him. The pretense resulted in no breach of privacy; it merely encouraged the suspect to say things which he was willing and anxious to say to anyone who would be interested in purchasing marihuana (sic)."[32] The absence of reliance on privacy was the apparent crux of the Court's decision. It is submitted that *Katz* is the only one of the four cases which propounds any general proposition: Where an unauthorized eavesdrop is conducted in violation of an individual's right or privacy, justifiably relied upon, the fruits of the surveillance will not be admissible as evidence in a criminal prosecution. *Hoffa, Osborn* and *Lewis* are simply illustrations of circumstances in which the reliance on privacy is not justifiable, and hence the evidence obtained by the surveillance is legally obtainable and admissible.

It is further submitted that the *Katz* decision does not prohibit electronic eavesdropping absolutely, nor in fact does it interpret the fourth amendment as prohibiting any eavesdropping where it is conducted pursuant to a warrant issued on a sufficient showing of probable cause. Mr. Justice Stewart remarked of the surveillance:

> It is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate properly notified of the need of such investigation, specifically informed of the basis on which it was to proceed, and clearly appraised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.[33]

The opinion additionally asserts that any surveillance is permissible when conducted for a narrow and particularized purpose, pursuant to judicial authorization, so as not to cause a greater invasion of privacy than is necessary under the circumstances.[34]

32. *Id.* at 212.
33. 88 S. Ct. 507, 513 (1967).
34. *Id.*

The Court's concern then, is not so much with "implications of . . . frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society,"[35] as with the manner and circumstances in which electronic surveillance is conducted. With the exception of wiretapping, the issue has never been one of imposing an absolute prohibition on such practices because of the fourth amendment. Rather, the query has been whether eavesdropping, electronic or by means of informers, is indeed pervaded by the sanctions of the fourth amendment. *Katz* clarifies that electronic surveillance is a type of search and seizure, and is a perfectly legal means of acquiring proof of the commission of a crime when conducted pursuant to a warrant issued where there exists probable cause.

The criteria of a legal electronic search and seizure, and the sufficiency of purported probable cause, were delineated in the recent case of *Berger v. New York*.[36] In that case, a recording implement was employed to conduct a surveillance of two weeks' duration, pursuant to judicial order rendered in accordance with a New York statute.[37] In holding the evidence procured inadmissible, the Court said that the statute failed to meet standards of particularity prescribed by the fourth amendment, namely that: The eavesdrop must be limited both in time and scope; must be judicially authorized only on a showing of probability that a particular offense has been or is being committed; and must involve no more than the necessary degree of invasion.[38]

Katz resolves a controversy which has too long burdened society. It placates those who regard electronic eavesdropping as a despicable, unnecessary practice, by subjecting such practice to sanctions sufficient to protect the right of privacy. Concurrently it avoids the imposition of an unreasonable burden on law enforcement personnel. The decision strikes a necessary and desirable compromise. For, while no good public policy would be served by depriving law enforcement agencies of the benefit of evidence which can often be procured only by means of electronic surveillance,

35. Silverman v. United States, *supra* note 17, at 509.
36. 388 U.S. 41 (1967).
37. N.Y. CODE CRIM. PROC. § 813-a.
38. Berger v. New York, *supra* note 36.

neither would public policy best be served by allowing such surveillance to be conducted with unrestrained inattention to individual dignity. The Court has recognized that the electronic eavesdrop is an indispensable tool of effective police investigation, but has insured that it will not create an arena for "a dirty game in which 'the dirty business' of criminals is outwitted by 'the dirty business' of law officers."[39]

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39. On Lee v. United States, *supra* note 16, at 758 (1952). (Dissent).