THE FOURTH AMENDMENT AND ELECTRONIC EAVESDROPPING:
A Survey of Constitutional Change

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A Survey of Constitutional Change

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ABSTRACT

THE FOURTH AMENDMENT AND ELECTRONIC EAVESDROPPING:
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The United States Supreme Court has been struggling for four decades with the problem of applying the "search and seizure" provision of the Fourth Amendment as a protection against invasions of privacy in the form of electronic eavesdropping. The Court has rendered many opinions in this unclear area that leave many students of the Fourth Amendment wondering about the true application of the Amendment to electronic eavesdropping.

It is the purpose of the writer to attempt to clarify the Court's pronouncements in this unclear area. In doing this, the writer has traced the evolution of the litigation surrounding the application of the Fourth Amendment to electronic eavesdropping. The Court first began its application of the Fourth Amendment to electronic eavesdropping in 1928 with the Olmstead decision, when it declined to give Fourth Amendment protection to victims of electronic eavesdropping.

In 1967, with the Katz decision, the Court revolutionized its approach to the application of the Fourth Amendment to electronic eavesdropping. Here the Court departed from precedent to give the "search and seizure" provision new meaning. In 1968, Congress, in an attempt to legalize electronic eavesdropping for law enforcement purposes, enacted Title III of the Omnibus Crime Control and Safe Streets Act.

At this writing, no decisions involving the provisions of Title III have been rendered by the Court; thus, at present it would be difficult to predict the Court's reaction to Title III. It remains to be seen just how the Court will react to these new legislatively sanctioned procedures in the still quite unsettled area of electronic eavesdropping.

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INTRODUCTION

> 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 Warrants 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.[1]

The Fourth Amendment is probably one of the most litigated provisions of the Bill of Rights. Its provisions have been applied by the Supreme Court to important areas of criminal investigation and law enforcement including arrest, search and seizure, and in some instances, interrogation.[2] The issues framed by the Court concerning the Fourth Amendment bring into vivid contrast the right of the individual to be protected from official enfringement on his constitutional rights versus the right of society to be protected from criminal activity. There are certain groups of attorneys, jurists, and educators who believe that the Supreme Court has gone too far in protecting the rights of the individual and has forgotten the right of the community to be adequately protected by law enforcement agencies from criminal activity.[3]

The Fourth Amendment, unlike many other procedural

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[1] U.S. Const. amend. IV.

[2] Wong Sun v. United States, 371 U.S. 471 (1963).

[3] C. Peter Magrath, Constitutionalism and Politics: Conflict and Consensus (Glenview: Scott, Foresman and Company, 1968), p. 130.

guarantees of the Bill of Rights, is not a self-enforcing provision. For instance, if a defendant is denied counsel and a conviction results, once the claim is proved, the ruling of the trial court will be automatically reversed on appeal. However, this is not the case when evidence seized in an unconstitutional manner is used to obtain a conviction. Unless this evidence is excluded from the trial, the Fourth Amendment is reduced to mere words with no conclusive meaning. It was in 1914 that the Supreme Court decided to give the Fourth Amendment's guarantee against an unreasonable search and seizure effectiveness, when it ordered the exclusion from federal trials of evidence which had been seized in an unconstitutional manner.[4] It is this "exclusionary rule" which has been perhaps the most controversial area of Supreme Court doctrine concerning the Fourth Amendment.

Since 1949, the problem of unconstitutional searches and seizures by state law enforcement officers has been a second important area of Supreme Court decision making. The action of state officials was not within the protection of the Bill of Rights and searches by state law enforcement officers were not subject to the direct control of the Fourth Amendment. In 1949, the Court did rule to embody

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[4] Weeks v. United States, 252 U.S. 383 (1914).

the Fourth Amendment into the flexible "due process" clause of the Fourteenth Amendment, but without including its enforcement feature, the exclusionary rule.[5] In a series of cases which followed, the Court sought to lay down guidelines which would make clear the constitutional safeguards against unconstitutional state searches which the due process clause provided. This series of rulings culminated in 1961 with the Court requiring that evidence obtained in an unconstitutional manner be excluded from state trials.[6]

Until 1928 the Court was concerned exclusively with searches that involved a physical intrusion or a physical trespass. At this time the Court encountered a situation which required a new interpretation of the "search and seizure" provision of the Fourth Amendment--an interpretation which a majority of the Justices were unwilling to hand down. The case under consideration concerned the use of wiretapping by federal officials in enforcing prohibition. The Court refused to apply to the wiretapping victims the protections afforded by the Fourth Amendment.[7] Moreover, the Court declined to consider wiretapping an unreasonable search and seizure within the meaning of the Fourth Amendment; therefore,

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[5] Wolf v. Colorado, 338 U.S. 25 (1949).

[6] Mapp v. Ohio, 367 U.S. 643 (1961).

[7] Olmstead v. United States, 277 U.S. 438 (1928).

the exclusionary rule was not applied.

This decision met with much criticism from many segments of American society and as a result many attempts were made at the passage of legislation in Congress. However, not until 1934 was any such legislation enacted.[8] Since that time the Court has been struggling with the problem of interpretating the relevant portion, section 605, of the Federal Communications Act whenever confronted with a wiretapping case.

As electronic techniques developed, cases concerning the use of non-telephonic electronic eavesdropping began to come before the Court. The Court was first confronted with this problem in 1942.[9] If a physical trespass occurred in a "bugging" operation, the evidence would be inadmissable because of the unconstitutional means used in acquiring it. However, in this first case, no physical trespass occurred and the Court held that there had been no violation of the Fourth Amendment.[10]

The Court continued to cling to this "no physical trespass--no violation" doctrine in subsequent cases until

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[8]For a text of section 605, see Appendix A.

[9]Goldman v. United States, 316 U.S. 129 (1942).

[10]Ibid., 134.

1967, when it ruled that the Fourth Amendment ". . . protects people, not places . . . ."[11]

This introduction is intended to be a brief outline of what the writer seeks to accomplish in this paper: to review the evolution of the litigation surrounding the "search and seizure" provision of the Fourth Amendment, coupled with the Amendment's enforcer, the exclusionary rule; next, there will be special emphasis placed on electronic surveillance and the recent Katz decision; finally, there will be a treatment of the major developments in the field since the Katz decision.

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[11] Katz v. United States, 389 U.S. 347 (1967).

CHAPTER I

Before coming to the major purpose of the present chapter, it seems necessary to provide a brief introduction to the Fourth Amendment.[1]

The overshadowing importance of the Fourth Amendment lies in the fact that it affords the people "[t]he right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." At the time the Fourth Amendment was adopted, in 1792, the Founding Fathers could still remember their experience with the hated English "writs of assistance," which allowed a blanket authority of search and seizure. The existence of the "writs of assistance" in America during the colonial days is without a doubt one of the leading reasons why the Fourth Amendment is embodied in the Federal Constitution.[2]

Law enforcement officials are required by the Fourth Amendment to procure search warrants unless the proposed search is incident to a lawful arrest. The issuance of a search warrant must be based on probable cause and must state

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[1] On the history of the Fourth Amendment, see Nelson B. Lasson, The History and Development of the Fourth Amendment To the United States Constitution (Baltimore: The Johns Hopkins Press, 1937).

[2] For a general discussion of the "writs of assistance" see Jacob W. Landynski, Search and Seizure and the Supreme Court (Baltimore: The Johns Hopkins Press, 1966), chapter 2.

specifically the place to be searched and the article(s) to be seized.[3] In addition, the search warrant must be supported by an oath from the officer requesting it.[4]

At this point the reader should be reminded that the intent of the writer in the present paper is to review the "search and seizure" provision of the Fourth Amendment with specific regard to its application to non-telephonic electronic eavesdropping. However, in order to promote a greater understanding of the problems involved, it is necessary to deal with the historical development in the present chapter. This will be accomplished by surveying the development of the exclusionary rule and its application to wiretapping (telephonic electronic eavesdropping), and the application of same to non-telephonic electronic eavesdropping.

The Development of the Exclusionary Rule

There seems to be some conflict as to the beginning of the Federal Exclusionary Rule. One author attributes its beginnings to the case of Boyd v. United States,[5] 116 U.S. 616

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[3] C. Herman Pritchett, The American Constitution (2nd ed.; New York: McGraw-Hill Book Company, 1968), pp. 603-4.

[4] Hubert E. Dax and Brook Tibbs, Arrest, Search, and Seizure (Milwaukee: Hammersmith-Kortmeyer, 1959); Walter V. Schaefer The Suspect and Society (Evanston: Northwestern University Press, 1967).

[5] Landynski, Search and Seizure, p. 6.

(1886). Another begins his account with Weeks v. United States,[6] 232 U.S. 383 (1914). The Boyd case will be the starting point in the present treatment.

The Boyd case was the first of real importance concerning the "search and seizure" provision of the Fourth Amendment. The litigation in this case was based on a Federal statute of 1874 which provided for forfeiture and penalties against any person attemping to defraud the government.[7] E.A. Boyd and Sons, importers, were accused of attempting to import plate glass without paying duties on it. The claimants were required under the Federal statute to produce in court the invoice for the plate glass in question. The statute further authorized the court to take the prosecutor's allegations as confessed if the invoice was not produced.[8]

The claimants contended that the statute in question was unconstitutional in so far as it compelled them to produce evidence that would be instrumental in their conviction. They held that this law was repugnant to the Fourth and Fifth Amendments to the Constitution and evidence obtained from them should not be used against them.[9]

The Court, in a lengthy opinion by Justice Bradley,

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[6] Joseph A. Varon, Searches, Seizures and Immunities, Vol. II (New York: Bobbs-Merrill Company, Inc.), p. 629.

[7] 116 U.S. 616, 617.

[8] Ibid., 620.

[9] Ibid., 621.

deliberated the more important question at hand: Is a compulsory production of a man's private papers to be used in evidence against him an unreasonable search and seizure within the meaning and scope of the Fourth Amendment? The majority opinion stated that

> . . . suits for penalties and forfeiture, incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; and we are further of the opinion that a compulsory production of private books and papers of the owner of the goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search seizure, within the meaning of the Fourth Amendment . . . .[10]

The rule of law which seems inherent in this case, but which was espoused by dicta--the inadmissability of unconstitutionally seized evidence--was not firmly established at this time. The Boyd rule did prevail at a later date, but only after it was repudiated in Adams v. New York.[11] It is needless to go into depth with the treatment of this case, because it was not instrumental in establishing the exclusionary rule. It is adequate to note that Justice Day, who delivered the opinion of the Court, was inclined to go out of his way to stress his adherence to the common law

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[10] Ibid., 638.

[11] 192 U.S. 585 (1904).

rule which states that a trial court must not create a collateral issue by holding up the progress of the trial to inquire as to how the evidence was obtained.[12]

In 1914 the Adams decision was in turn repudiated by Weeks v. United States.[13] The Weeks decision established the Federal Exclusionary Rule which stands today and has now been extended to the States.[14]

Weeks, the plaintiff, had been indicted on the charge of illegal use of the mails in violation of the United States Criminal Code. The accused was arrested without a warrant and his home was ransacked twice without the authority of a search warrant. During each search, one of which was conducted by the local police and the other by a federal marshall, papers and documents were taken from his home because of their evidentiary value. The defendant filed a petition with the court before the beginning of his trial, praying for the return of his property, which was denied by the court.[15]

Justice Day, who had delivered the Adams opinion, delivered the unanimous decision of the Court. It was held that the evidence, Weeks' private property, was taken from his home in direct violation of his constitutional rights.

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[12] Landynski, Search and Seizure, p. 62.

[13] 232 U.S. 383 (1914).

[14] Mapp v. Ohio, 367 U.S. 643 (1961).

[15] 232 U.S. 383, 386.

The Court extended this ruling only to the United States Marshall, and not to the local police, because ". . . the Fourth Amendment is not directed to the individual misconduct of such officials."[16] Thus, in this famous case, the emergence of the Federal Exclusionary Rule is seen; the doctrine without which the Fourth Amendment is reduced to a mere ". . . form of words."[17]

The "Rule of the Weeks case" is clearly applicable only to federal officials. What about state law enforcemnt officers? Are they allowed to go about "searching and seizing" without any constitutional checks? Until 1949, this seemed to be the situation, but that year the Court saw fit to interpret the "search and seizure" provision of the Fourth Amendment in terms of constitutional checks on state officials.[18]

The Wolf case involved an abortionist who had been indicted and convicted on the basis of evidence seized in an unauthorized search of his office. Wolf's conviction was upheld by the Colorado Supreme Court and the U.S. Supreme Court granted certiorari. The question before the Court here was stated as follows: Was Wolf denied "due process of law" guaranteed by the Fourteenth Amendment when convicted of a crime on

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[16] Ibid., 398

[17] Majority opinion by Justice Holmes in Silverthorne Lumber Company v. United States, 251 U.S. 385 (1920).

[18] Wolf v. Colorado, 338 U.S. 25 (1949).

the basis of evidence that would have been inadmissable in a federal court.[19]

The Court, in an opinion written by Justice Frankfurter, concluded that freedom from unreasonable searches and seizures is an essential element in the concept of "ordered liberty" and is entitled to Fourteenth Amendment protection against state action. The majority alluded to the idea that the Fourth Amendment should be embodied in the Fourteenth, but failed to act on the matter at this time. Thus, the Federal Exclusionary Rule was not extended to unconstitutional state action.[20]

With the majority opinion came a strong dissent from Justice Murphy. Murphy regarded the Federal Exclusionary Rule as the only efficient means to deter violations of the "search and seizure" provision of the Fourth Amendment by state officials, and therefore he urged that it should be applied as a part of the Fourteenth Amendment.[21]

Three years later, the Court encountered difficulty in applying the Wolf rule in Rochin v. California.[22] Rochin was prosecuted for the illegal possession of narcotics. Three

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[19] Ibid., 25-6.

[20] Ibid., 28-9.

[21] Ibid., 44.

[22] 342 U.S. 165 (1952).

deputy sheriffs, possessing information that Rochin was selling dope, entered his house and forced open his bedroom door. Rochin was partly dressed, and his common law wife was in bed. Seeing the deputy sheriffs, Rochin seized two capsules, which were on the nightstand beside the bed and put them in his mouth. The deputies grabbed Rochin in an effort to extricate the capsules, but they failed. After their unsuccessful attempt to get the capsules, the deputies then handcuffed Rochin, and took him to a hospital. There his stomach was pumped by a doctor under the direction of the deputies. The process revealed two capsules containing morphine. Rochin's subsequent conviction was based on his illegal possession of the two capsules containing morphine.[23]

Justice Frankfurter, speaking for a unanimous Court, reversed the conviction. Under the Wolf doctrine this evidence would have been admissable, save the fact that the deputies went beyond the acceptable bounds of "due process." Frankfurter, in the majority opinion, stated:

> This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents--this course of proceeding by agents of the government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit constitutional differieniation.[24]

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[23] Ibid., 166.

[24] Ibid., 172.

Again in 1954, the Court was faced with the application of the Wolf doctrine. In the case of Irvine v. California[25] the Court revived the Wolf doctrine and made it applicable. Irvine was suspected of illegal bookmaking, but the police were without proof. In order to obtain the needed evidence, the police installed a microphone in Irvine's residence and later returned twice to move the microphone to better positions. The police listened to the conversations in Irvine's household for approximately one month until they had recorded enough evidenec to procure a warrant for his arrest.[26]

The Court, in an opinion by Justice Jackson, held that under the Wolf doctrine this evidence was admissable. Wolf provided no basis for denying the state's right to get a conviction by these means.[27] The Wolf doctrine emerged from the Irvine encounter apparently unchanged; however, in reality, its time was growing short. In 1961 the Court overruled the Wolf doctrine in favor of applying the exclusionary rule to the States.[28]

In 1957 three policemen of the Cleveland police department appeared at the home of Miss Dollree Mapp. They knocked at the door and demanded entrance into the house. Miss Mapp

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[25] 347 U.S. 128 (1954).

[26] Ibid., 130-1.

[27] Ibid., 132.

[28] Mapp v. Ohio, 367 U.S. 643 (1961).

promptly telephoned her attorney, who advised her not to let the policemen enter unless they produced a search warrant. Not having such a warrant, the officers took up watch outside the house for three hours, at which time they were joined by at least four other officers. The reinforced group of police officers then forced their way into the house, and upon arrival of Miss Mapp's attorney, refused to let him see her. When Miss Mapp demanded that they produce a search warrant one of the officers waved a piece of paper in front of her which ostensibly was a warrant. Miss Mapp seized the piece of paper, which she thought was a warrant, and concealed it on her person in the mistaken belief that her bodily privacy would protect it. Following a struggle, the officers retrieved the piece of paper, handcuffed her, and locked her in her bedroom. Then the officers, in the course of a search, found obscene materials which were later used as evidence to indict and convict Miss Mapp. The obscene materials were not what the officers were originally looking for, but they served the purpose of getting a conviction.[29]

In an opinion by Justice Clark, the Court overruled the Wolf doctrine saying in part:

> The ignoble shortcut to conviction left open to the States [by Wolf] tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to

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[29] Ibid., 644.

> privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise.[30]

Thus, the States were brought into alignment with the Federal Government concerning the Constitutional Law of "search and seizure."

In subsequent cases the Court continued to follow the rationale of the Mapp decision, giving the Fourth Amendment an even more firm foundation in the Fourteenth.[31] However, the Court failed to apply the Mapp decision retroactively, as it had done in many instances when a new constitutional doctrine was put forth.[32]

The development of the exclusionary rule has been a long and painstaking process. It began with the Boyd decision in 1886, in which the first attitudes toward the inadmissability of unconstitutionally seized evidence were implicitly espoused, and culminated in the Mapp decision in 1961, when the exclusionary rule was applied to the States. In the beginning the exclusionary rule was not considered to be a constitutional guarantee, but merely a judicially contrived rule of evidence. Moreover, it was not until the Mapp case that

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[30] Ibid., 655.

[31] Ker v. California, 374 U.S. 23 (1963); Aguilar v. Texas, 378 U.S. 108 (1964).

[32] Linkletter v. Walker, 381 U.S. 618 (1965).

the exclusion of unconstitutionally seized evidence was considered a constitutional doctrine.[33]

So far this chapter has dealt specifically with physical intrusions, which have been held to constitute unreasonable searches and seizures. There is, however, another type of intrusion which does not involve a physical trespass. At this point the writer will attempt to treat this special type of "search and seizure."[34]

The Application of the Exclusionary Rule To Wiretapping

The first case to reach the Court that involved wiretapping was Olmstead v. United States.[35] This case raised a question concerning the relationship of wiretapping to the constitutional guarantee against an unreasonable search and seizure.[36] Roy Olmstead was the leader of a "giant" conspiracy to violate the National Prohibition Act, through the illegal importation and sale of alcoholic beverages. Federal prohibition agents secured evidence against the "gang" by tapping their telephones and recording their conversations over a period of five months.

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[33] Varon, Searches, Seizures, and Immunities, pp. 629-33.

[34] Landynski, Search and Seizure, chapter 4; Edward Long, The Intruders (New York: Frederick A. Praeger, 1966), pp. 128-46.

[35] 277 U.S. 438 (1928).

[36] For a detailed account of the events surrounding the Olmstead case, see Walter F. Murphy, Wiretapping On Trial (New York: Random House, 1965).

The recorded conversations filled 775 typed pages. The tapping operation took place in the basement of Olmstead's office building; thus, there was no actual trespass on private property.[37]

In a five-to-four decision, the Court proclaimed that wiretapping did not violate the "search and seizure" provision of the Fourth Amendment. Chief Justice Taft, speaking for the majority, maintained that "[t]here was no searching . . . . The evidence was secured by the use of . . . hearing and that only. There was no entry of the houses or offices of the defendants."[38] The majority opinion went on to say that the Fourth Amendment did not apply to the seizure of intangible property. Moreover, a person who uses a telephone is in communication with someone who is outside his house:

> The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office . . . .[39]

This case is a landmark constitutional decision. Of particular interest to the development of the exclusionary rule as applied to intangible evidence are the dissents written by Justices Holmes and Brandeis. Justice Holmes, in his dissent, noted that wiretapping was a crime in the State of Washington, where the acts occurred, and insisted that the

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[37] 277 U.S. 438, 439.

[38] Ibid., 464.

[39] Ibid., 465.

United States Government should have no part in such a "dirty business." Moreover, Holmes stated that the

> . . . government should not itself foster and pay for other crimes, when they are the means by which evidence is to be obtained . . . . We have to choose, and for my part I think it less an evil that some criminals should escape than the government should play such an ignoble part.[40]

Justice Brandeis, also dissenting, made his feelings known when he asserted in unequivocal terms that wiretapping was a search within the meaning and scope of the Fourth Amendment. He insisted that the Constitution was sufficiently flexible to deal with problems not known when it was framed: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."[41] One might conclude that Justice Brandeis was of the opinion that the Fourth Amendment should be construed liberally keeping in mind its underlying purpose rather than its literal construction.

The Olmstead decision was quite unfavorably received throughout the nation. It brought forth numerous legislative efforts aimed at nullifying its effects. In 1934 Congress enacted the Federal Communications Act, which contained a provision--section 605--that states in part:

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[40] Ibid., 470.

[41] Ibid., 472-3.

> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of any such intercepted communication to any person . . . .[42]

Section 605 was construed to apply to the interceptance and the divulgence of wiretap information. This application was implicitly arrived at by the Court, for section 605 says nothing about telephone messages.[43]

In 1937, with the case of Nardone v. United States,[44] the Court began its interpretation of section 605. Nardone was convicted on a charge of smuggling alcohol. Federal agents, through the utilization of wiretapping, obtained the evidence they needed to convict Nardone. In an opinion by Justice Roberts, the Court held inadmissable, evidence obtained in violation of section 605. The Court further insisted that since section 605 prohibited the interception and divulgence of telephone information, ". . . to recite the contents of the message in testimony before a court is to divulge the message."[45] Roberts rejected the government's contention that the statute was not directed toward government officials engaged in law enforcement. "Taken at

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[42] Federal Communications Act, sec. 605, 48 Stat. 1103, 47 U.S.C.(1934); See Appendix A.

[43] Nardone v. United States, 308 U.S. 338 (1937).

[44] 308 U.S. 338 (1937).

[45] Ibid., 382.

face value," he insisted, "the phrase 'no person' comprehends federal agents . . . ."[46] Obviously, this decision effectively circumvented the Olmstead decision without overruling it. The Court apparently did not wish to overrule Olmstead, but felt that wiretapping was prohibited by section 605.

Due to the ambiguous wording of section 605, federal agents continued to look for loopholes which would allow them to continue their utilization of wiretapping. The Court further rebuffed these attempts in the case of Weiss v. United States,[47] when it applied the Nardone decision to intrastate as well as interstate telephone conversations. Had the Court not ruled in this manner in Weiss, the federal agents would not have been severely handicapped. But now all the telephone calls in the United States were protected by the Nardone doctrine.[48]

The federal officials, more frustrated than ever, endeavored to find other means that would allow them to use wiretap evidence in court. In the second Nardone case,[49] the government attempted to make a conviction stand on evidence which was derived from wiretap information, or evidence gotten from such "leads." The Court again shut the door in the gov-

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[46] Ibid., 381.

[47] 308 U.S. 321 (1939).

[48] Landynski, Search and Seizure, p. 208.

[49] 308 U.S. 338 (1939).

ernment's face when it held that evidence gotten from wiretap "leads" would be inadmissable because, in the words of Justice Frankfurter, it was ". . . a fruit of the poisonous tree."[50]

After this series of decisions, it became quite evident, by their interpretation of section 605, that the Court was attempting to overrule the Olmstead doctrine. In these cases the Court referred continually to search and seizure precedents and it was soon apparent that in the eyes of the Court section 605 had no independent existence outside the framework of the Fourth Amendment. The Court persistently offered, in justification, ingenious readings of the statute, but was at the same time extending Fourth Amendment protection to telephone conversations. Therefore, section 605 made wiretapping illegal in the same manner as warrantless searches; moreover, it made evidence obtained by wiretapping inadmissable, whether it be original or in a derived form.[51]

In 1942 the Court was faced with important litigation concerning the Fourth Amendment and its counterpart, section 605.[52] In the Goldstein case the Court had to determine whether a person convicted from wiretap evidence, though not a party to the intercepted calls, has standing to move to

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[50] Ibid., 341.

[51] Landynski, Search and Seizure, p. 209.

[52] Ibid., 121.

suppress the evidence in light of section 605. The government argued that Goldstein's personal rights were not violated; therefore, the conviction should stand. Justice Roberts, for the majority, found for the governemnt saying that only the sender is protected by section 605, and only he can make a divulgence lawful by giving his consent.[53]

In another case decided the same day, Goldman v. United States,[54] the Court retreated to the Olmstead doctrine. In this case there was no actual penetration of telephone lines by federal agents; thus, their action was not within the scope of section 605. The federal officers placed a detactaphone against the wall of the room adjoining the suspect's office. Justice Roberts, speaking for the majority, insisted that there was no violation of the Fourth Amendment. The reasoning given was essentially the same as in the Olmstead case.[55] The Goldman decision will be discussed below in relation to non-telephonic electronic eavesdropping.

Ten years later, in Schwartz v. Texas,[56] the Court further limited the effectiveness of section 605 by means of another Fourth Amendment analogy which held illegal wiretap evidence

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[53] Ibid., 121.

[54] 316 U.S. 129 (1942).

[55] See above, Olmstead v. United States, 277 U.S. 438 (1928).

[56] 344 U.S. 199 (1952).

admissable in the state courts. This interpretation of the Court coincided with the Constitutional Law concerning conventional searches and seizures at that time. That is, the Court applied the doctrine espoused in Wolf v. Colorado[57] to wiretap evidence in the state courts.

This interpretation was a boon to law enforcement officers since most law enforcement takes place at the state and local levels, as does wiretapping. The Court had applied section 605 to all telephone conversations in the United States,[58] but in the Schwartz decision, it failed to extend the enforcer--the exclusionary rule--to the state courts.

Five years passed before the Court encountered another case concerning wiretapping; it was Benanti v. United States.[59] Benanti, believed to be engaged in narcotics traffic, was the victim of a wiretap by local law enforcement officers. The officers were acting under authority of a New York State statute which allowed them to obtain warrants for wiretaps in the same manner as they would for conventional searches. Acting on leads obtained from wiretap information, the officers instituted a search which revealed no narcotics, but five non-tax paid gallons of alcohol. Benanti was convicted in

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[57] 338 U.S. 25 (1949).

[58] Weiss v. United States, 308 U.S. 321 (1939).

[59] 335 U.S. 96 (1957).

a federal court for the illegal possession of non-tax paid alcohol.[60]

The Court, in an opinion written by Chief Justice Warren, turned away from the alignment of section 605 with the Fourth Amendment. The majority relied on the provision's "built-in" exclusionary rule. The Chief Justice pointed out:

> Confronted as we are by this clear statute, and resting our decisions on its provision, it is neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the Fourth Amendment. Section 605 contains an express, absolute prohibition against the divulgence of intercepted communications . . . .[61]

The Court further limited the scope of section 605 in a ruling handed down the same day as the Benanti decision.[62] In the Rathbun case, the Court pointed to the fact that a party to a telephone conversation could make wiretapping legal if he gave his consent. Chief Justice Warren stated that

> . . . each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties can complain. Consequently, one element of section 605, interception, has not occurred.[63]

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[60] Ibid., 97.

[61] Ibid., 102.

[62] Rathbun v. United States, 355 U.S. 107 (1957).

[63] Ibid., 110.

In the latest case to reach the Court concerning wiretapping, Berger v. New York,[64] the constitutionality of a New York State statute was decided. In recent years proposals have been made to allow wiretapping under court order, so that information obtained would be admissable in court. The New York statute allowed such a procedure in an effort to utilize wiretaps, but the Court, with Justice Clark speaking for the majority, ruled that the statute was "too broad in its sweep, resulting in a trespassory intrusion into a constitutionally protected area."[65] Clark also pointed out in his opinion that statutes could be written to satisfy the Fourth Amendment guarantees. They must be "discriminate" and "particularistic" in their wording in order to be constitutional.

In the Berger case, it was noted that a state was attempting to legalize wiretapping under certain circumstances, if the tap was under authority of a court order. In light of the Berger decision, it would be appropriate to consider the wisdom and constitutionality of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[66] The Act specifically authorizes certain eavesdrops (wiretapping), but is very detailed in its regulation of electronic surveillance

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[64] 388 U.S. 41 (1967).

[65] Ibid., 43.

[66] Omnibus Crime Control and Safe Streets Act, Title III, 87 Stat. 197 (1968).

such as wiretapping. The general purpose if the Act is stated in section 801(d):

> To safe guard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communications has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.[67]

Thus, the Act authorizes a limited use of wiretapping as long as it is done under authority and supervision of a court competent to handle such matters. The statute further limits wiretapping to "specific categories of crime" and "major types of offenses." However, the list of offenses turned out to be quite lengthy; it would not be useful to enumerate the offenses at this point.[68]

Moreover, the 1968 Act specifically amends section 605 of the Federal Communications Act of 1934 to authorize such procedures as are called for by the 1968 Act.

The Application of the Exclusionary Rule To Non-Telephonic Electronic Eavesdropping

Thus, at present, wiretapping is presenting no special

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[67] Ibid., sec. 801(d).

[68] See Appendix B.

constitutional problems. Constitutional and statute law make quite clear what procedures must be followed in the use of a wiretap. At present, however, there is another type of eavesdropping which presents a "sinister" threat to the privacy of the American public.[69] This is non-telephonic electronic eavesdropping, to which Justice Brandeis alluded in his famous dissent in the Olmstead case.[70] This type of eavesdropping is done without tampering with telephone lines; therefore, it does not come within the scope of section 605.

The first case to reach the Court concerning electronic eavesdropping was Goldman v. United States.[71] In the above discussion of this case, it was noted that the law enforcement officers used an electronic device, a detectaphone, to record the conversations in the adjoining room. The officers did this without any interference to the telephone lines leading into the suspect's office. Since there was no interception of a telephone conversation, section 605 was not violated. The Court insisted that there was no physical trespass, and by the same token, the Fourth Amendment had not been violated.[72]

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[69] Samuel Dash, The Eavesdroppers (New Brunswick: Rutgers University Press, 1959), pp. 339-79.

[70] 277 U.S. 438 (1928).

[71] 316 U.S. 129 (1942).

[72] Ibid., 132.

The next important case in this somewhat unsettled area was On Lee v. United States.[73] This case presented a new problem for the Court to interpret. On Lee, a Chinese laundryman, was suspected of violating federal narcotics laws. The evidence used in the conviction of On Lee was obtained by a governemnt undercover agent, who was a former employee of On Lee. The agent, wired for sound with a transmitter which relayed any noise to a nearby receiver, walked into On Lee's shop and engaged him in an incriminating conversation which led to his conviction.[74]

Justice Jackson, writing for the majority, sustained the conviction with primary reliance on the Goldman decision. The government undercover agent made no trespass in that he was admitted with On Lee's consent, thereby not infringing on the defendant's constitutional rights.[75]

The Court, in 1961, again came face-to-face with the problems surrounding electronic eavesdropping.[76] For the first time, it overruled a conviction gotten by means of an electronic eavesdrop. The police made use of a device known as a "spike-mike"--a microphone with a foot-long spike

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[73] 343 U.S. 747 (1961).

[74] Ibid., 748.

[75] Ibid., 751.

[76] Silverman v. United States, 365 U.S. 505 (1961).

attached to it--in order to obtain information concerning gambling that was believed to be going on in Washington, D.C. The "spike-mike" was inserted into a heating duct in the gambler's headquarters, thereby rendering the entire heating system a conductor of sound. Justice Stewart, for the majority, maintained that this eavesdrop was an unauthorized intrusion into the private premises which made it beyond the scope of the opinions previously espoused in Goldman and On Lee. The opinion stressed the fact that the Court considered a mere physical intrusion sufficient grounds for invoking the guarantees of the Fourth Amendment.[77]

Justice Douglas, in a concurring opinion, raised an interesting point. He centered the thrust of his concurrence on the right of a person to have privacy of action within his home. He maintained that ". . . the depth of penetration of the electronic device . . . is not the measure of the injury. Our sole concern should be whether the privacy of the house was invaded."[78]

Until Katz v. United States[79] in 1967, the most fully considered case on the subject of electronic eavesdropping was Lopez v. United States[80] in 1963. Lopez, under inves-

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[77] Ibid., 511.

[78] Ibid., 513.

[79] 389 U.S. 347 (1967).

[80] 373 U.S. 427 (1963).

tigation for evasion of excise taxes, attempted to bribe an internal revenue agent. The agent, after reporting the bribe offer to his superior, was instructed to continue to show interest in the bribe. In the mistaken belief that he was in the privacy of his office, Lopez again offered the bribe to the agent, who was outfitted with a miniature recording device. The recorded conversation was used to corroborate the agent's testimony, which convicted Lopez.[81]

Justice Harlan, speaking for the majority, sustained the conviction of Lopez saying that "[t]he Governemnt did not use an electronic device to listen in on conversations it could not otherwise have heard." The recording merely provided corroboration for the agent's testimony, and there is no " . . . constitutional right to rely on possible flaws in the agent's memory."[82]

An interesting dissent came out of this case, that of Justice Brennan joined by Douglas and Goldberg. In the words of Justice Brennan:

> If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record his words . . . . The right of <u>privacy</u> [emphasis added] would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness.[83]

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[81] <u>Ibid</u>., 429.

[82] <u>Ibid</u>., 439.

[83] <u>Ibid</u>., 441.

For so long, the Court has interpreted the Fourth Amendment in terms of physical intrusions into a person's home or property. But, at last, in 1967 the Court turned away from the idea that only victims of physical intrusions were protected by the "search and seizure" provision of the Fourth Amendment. In the Katz decision, the Court insisted that the Fourth Amendment should protect a person's right to privacy, if he so desires it, whether he be in his home, in another person's home, or in a "phone" booth.[84]

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[84] Katz v. United States, 389 U.S. 347 (1967).

CHAPTER II

The problem of electronic eavesdropping or "bugging" is far newer and far graver than the wiretapping problem. It is particularly serious because it is shrouded in a conspiracy of silence. Only occasionally is there an incident which demonstrates the grim truth to the public--that no conversation, however confidential, is really immune from the threat of a hidden microphone and/or a tape recorder.

Unfortunately, the law relating to electronic eavesdropping is even more chaotic and outdated than the law relating to wiretapping. The Federal Communications Act of 1934 is not applicable unless telephone, telegraph, or radio telegraph conversations are involved and the applicability of the "search and seizure" provision of the Fourth Amendment has not yet been definitely settled. Federal prosecutors apparently proceed on the rather conceptual theory that any form of electronic surveillance is constitutional so long as it is not accomplished by means of an "actual physical trespass." To support this position, federal prosecutors have relied on such constitutional pronouncements as those

should not stand by helplessly when criminals are using the inventions of modern science to perpetrate their criminal designs.

However, this consideration should not be applied to electronic eavesdropping. Its victims are not necessarily using any of the inventions of modern science to carry out their criminal actions. When law enforcement officers insist that they must overhear private conversations in private homes and offices, they are not using a new method of law enforcement against a new method of crime commission, as in wiretapping.

In his famous Olmstead dissent, Justice Brandeis recognized that the Fourth Amendment is primarily a protector of privacy. He pointed out that when the Constitution was adopted force and violence were the only known methods of compelling incriminating testimony or the production of private papers. But he continued:

> Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet . . . .
>
> 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 . . . . Can it be that the Constitution affords no protection against such invasions of individual security?[5]

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[5] Olmstead v. United States, 277 U.S. 438, 473-4 (1928).

in Goldman v. United States,[1] On Lee v. United States,[2] and Irvine v. California.[3] The "actual physical trespass" principle that is espoused in these cases is radically outdated and the time has come for some change in this area.

Most of the proposed changes, however, overlook both the basic character of electronic eavesdropping and the basic meaning of the Fourth Amendment. Wiretapping and electronic eavesdropping are generally treated as a single problem, with somewhat the same solution. For instance, the State of New York has a statute in its criminal code which allows for the securing of wiretapping and electronic eavesdropping warrants in the same procedural manner. There have even been proposals made in Congress for a federal statute which would allow similar procedure as in the New York statute. The flaw with this type of procedure is that eavesdropping invariably and inevitably constitutes a hunt for evidence. Wiretapping, on the other hand, has a dual aspect. It may constitute a search for evidence, but it may also be employed in the instance that the telephone becomes an instrumentality of the crime.[4] Fundamental fairness requires that the police

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[1] 316 U.S. 129 (1942).

[2] 343 U.S. 747 (1952).

[3] 347 U.S. 128 (1954).

[4] Robert N. Norris, "On Applying the 'Mere Evidence' Rule to Government Eavesdropping," 14 UCLA Law Review 1110 (1967).

As Mr. Richard Schwartz, discussing eavesdropping techniques in The Eavesdroppers, so clearly demonstrates, Justice Brandeis' fears have become a reality. Today it is possible to expose to a jury the most intimate occurrences from within the home. Recent advances in electronic eavesdropping devices would seem incredible if they were not so authoritatively documented. In a few minutes time, any telephone can be transformed into a microphone which transmits every sound in the room even when the receiver is on the hook. Tiny microphones can be secreted behind a picture or in some other inconspicuous place in a room. If wires cannot be readily concealed, a strip of special paint can be used as a wire. Moreover, wireless microphones have reached a high degree of sensitivity and strength.[6]

Even more "sinister" are the devices which can pick up every sound in a room from without. Great success has been reported with contact microphones. These devices can be placed on the outside of a picture window or against any surface which can act as a sounding board. There are also reliable reports concerning devices which pick up conversations which occur hundreds of feet away. A parabolic microphone can pick up conversations through an open window several hundred feet away. The possibility of beaming ultrasonic

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[6]Dash, The Eavesdroppers, pp. 303-58.

or electromagnetic waves into a room and thereby overhearing everything said in the room is still at the experimental level, but acoustical experts say that it appears very possible. The techniques section of The Eavesdroppers warns:

> To be certain of defense against any eavesdropping of this kind, one should shield his room completely with a continuous covering of aluminum foil and substitute for his window glass a special conducting glass made by several of the large glass companies . . . .[7]

The Dash study reveals widespread use of concealed microphones by state police and private detectives alike. The study did not include the activities of the federal officers but since concealed microphones are used by the District of Columbia police, it is only fair to assume that they are used by other officers in enforcing federal law. Private eavesdroppers are using concealed microphones in an endless variety of situations, from wives checking on the fidelity of their husbands to business firms checking on the loyalty and the efficiency of their employees. Several widely publicized incidents have underscored the frightening potentialities of such practices. One such incident involved a concealed microphone in the prison room assigned to a New York attorney for conferences with his clients. Public indignation ran especially high when it was discovered that the same room was used for hearing the confessions

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[7] Ibid., p. 358.

of Catholic prisoners. Popular indignation also soared when it was discovered that the New York Transit Authority was using hidden microphones to spy on the transit workers' union during a recent strike.[8]

Such practices must be distinguished from situations where a conversation is recorded or transmitted with the consent of one participant. Law enforcement officers, for example, may wear a concealed microphone or recording device when interviewing suspects or witnesses. Informers may agree to have a microphone concealed in their clothing when they engage the suspect in an incriminating conversation, so that police officers can overhear the conversation and testify as to its contents in court. This action is not as yet unconstitutional, but there are those who believe it should be.[9]

Where a conversation is recorded or transmitted without the consent of any participant, an entirely different situation is presented. This is the ultimate invasion of privacy--one which goes well beyond the normal conversation risks inherent in human relationships. It is absurd to hold that the Constitution protects private papers, but not private conversations. Electronic eavesdropping must consequently be recognized as a

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[8] Ibid., pp. 76-8.

[9] On Lee v. United States, 343 U.S. 747 (1952); Lopez v. United States, 373 U.S. 427 (1963). See Justcie Douglas dissenting in both cases.

search and seizure within the context of the Fourth Amendment.

In any treatment of electronic eavesdropping, one should consider the constitutional problems presented by that practice. First, there is no working definition of the phrase that the Court has adopted frequently in applying the "search and seizure" provision of the Fourth Amendment--the "right of privacy." Neither the Court, nor any one else, has adequately defined this phrase, consequently no one knows exactly what it means. Before progress can be made in applying the Fourth Amendment to the area of electronic eavesdropping, it seems necessary that this phrase should be clearly defined.[10] More will be said about the "right of privacy" at a later point.

A second constitutional problem in the area of electronic surveillance is that of the "all or nothing" proposition. This simply means that law enforcement officials should either be allowed to use electronic surveillance at any time or that electronic surveillance should be outlawed altogether. It goes without saying that this is no solution to the eavesdropping problem. It seems obvious that the unfettered use of electronic surveillance cannot be allowed, nor would one suggest the complete outlawing of this already proven effective law enforcement tool.

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[10] D.B. King, "Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations," 33 George Washington Law Review 240 (1964); _____, "Constitutional Law--Search and Seizure--Electronic Eavesdropping Held An Illegal Search and Seizure," 28 Ohio State Law Journal 527 (1967).

A third constitutional problem is that of determining what the relationship is between the "search and seizure" provision of the Fourth Amendment and the practice of electronic surveillance. One might conclude that this is the crux of the entire matter, because if this problem could be solved, all others surrounding the Fourth Amendment and electronic eavesdropping would be solved automatically. A certain relationship has been developed by the Court already, but this has not served to solve any problems as yet.[11]

A fourth problem is that posed by the advancement of technology in the area of electronic eavesdropping techniques. Technological advances have allowed law enforcement officers to listen and record private conversations without violating existing applications of the Fourth Amendment. Of course, while the Fourth Amendment is not violated in terms of the present Supreme Court rulings, it is contended here that the Fourth Amendment rights of the victim of the electronic surveillance are severely limited.[12] As has already been indicated at a previous point in this chapter, the state of the technology in this area is a grave danger to the right of privacy of every citizen. The constitutional pronouncements

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[11] _____, "Eavesdropping and the Constitution: A Reappraisal of Fourth Amendment Framework," 50 Minnesota Law Review 378 (1965).

[12] Ibid.

so far in this area have not considered this new technology.[13]

The last problem to be considered is that of the effectiveness of the Fourth Amendment limitation on electronic eavesdropping by law enforcement officials. This limitation has been viewed from three general positions: (1) absolute prohibition; (2) unrestricted use; (3) limited controlled use. It has already been determined that electronic surveillance is an effective law enforcement tool; consequently, it should be allowed to a certain extent. It is suggested that the Fourth Amendment, with its enforcer, the exclusionary rule, be used to control the use of electronic surveillance. It is admitted that this application would not control all electronic surveillance, but it would serve to keep the police within constitutional bounds when their surveillance is conviction oriented. Police surveillance intended as harassment would not be affected.[14]

It would seem that the entire problem surrounding the Fourth Amendment's application to electronic eavesdropping appears to revolve around the question of whether the Fourth Amendment guarantees a "right of privacy" or whether it primarily protects individuals against governmental intrusions upon their private property. It seems unnecessary to state

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[13] See note 6 supra.

[14] _____, "Eavesdropping and the Constitution," 50 Minnesota Law Review 378 (1965).

that electronic eavesdropping poses a serious threat to the individual's right of privacy, and it has challenged the Fourth Amendment to provide adequate safeguards for this right.[15]

What protection does the Fourth Amendment provide? The Fourth Amendment prohibition against an unreasonable search and seizure has been the traditional Constitutional protection against an unreasonable invasion of privacy in which there was an actual physical trespass. It is obvious now that this interpretation of the "search and seizure" provision of the Fourth Amendment does not provide adequate protection against an invasion of privacy which does not involve an actual physical trespass.[16]

The emerging "right of privacy" will furnish more adequate standards for determining the constitutionality of electronic surveillance. In several Supreme Court rulings there have been opinions by certain Justices which indicated their willingness to guarantee through the Fourth Amendment a "right of privacy" in certain instances.[17] Finally, in 1965,

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[15] Rudolph C. Barnes, Jr., "Constitutionality of Electronic Eavesdropping," 18 South Carolina Law Review 855 (1966).

[16] Contrast Goldman v. United States, 316 U.S. 129 (1942) with Silverman v. United States, 365 U.S. 505 (1961).

[17] Brandeis and Holmes dissenting, Olmstead v. United States; Douglas dissenting, On Lee v. United States; Douglas concurring, Silverman v. United States.

a majority of the Justices recognized that the constitutional guarantee of the "right of privacy" was embodied in most of the provisions of the Bill of Rights and especially the Fourth Amendment.[18]

It has been suggested that the courts should be allowed to authorize intrusions in the form of electronic surveillance into the private lives of individuals when there is probable cause to believe that criminal activity is taking place. But the major question here is: Can court ordered electronic eavesdropping meet the requirements of the Fourth Amendment? The very effectiveness of electronic eavesdropping lies in its "cloak and dagger" tactics--its secrecy. Can this type of search and seizure meet the procedural requirements specified in the body of the Fourth Amendment? It is maintained by several authors that even though court ordered electronic eavesdropping cannot hope to meet the requirements of "prior notice" and "specific description" the practice should be allowed when effective law enforcement would suffer. The problem that remains is that of the determination of whether the interests of a free society outweigh the interests of good law enforcement. The answer to this problem is what the courts must determine when faced with requests for warrants aimed at electronic

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[18]Griswold v. Connecticut, 381 U.S. 479 (1965).

eavesdropping.[19]

In addition to the "balancing of interests" in court ordered electronic surveillance, there are certain degrees of constitutional legality in electronic surveillance which must be recognized by the courts. The basis of the suggested approach is twofold: first, a distinction of constitutional dimensions between electronic eavesdropping which renders all conversations of an accused in his home or place of business subject to "seizure" and surveillance which is directed toward a specific conversation in which the auditor carries a hidden microphone and; second, a further distinction which focuses upon the degree of risk assumed by the accused in uttering self-incriminating statements to the auditor. There can be no doubt that the first method of electronic surveillance described is in violation of the Fourth Amendment and that any court order or warrant which authorizes such electronic surveillance is unconstitutional and should be prohibited.[20]

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[19]Barnes, "Constitutionality of Electronic Eavesdropping," 18 South Carolina Law Review 855 (1966); David H. Hines, "Fourth Amendment Limitation On Eavesdropping and Wiretapping," 16 Cleveland-Marshall Law Review 467 (1967); Allan Zaleski, "New Constitutional Limit For Electronic Eavesdropping Cases," 7 William and Mary Law Review 93 (1966).

[20]Robert A. Goldstein, "Fourth Amendment Limitations On Search For Evidence By Means of Court Ordered Electronic Surveillance," 21 NYU Intramural Law Review 109 (1966).

Moreover, a number of writers in the field are urging the need for legislation in this unclear area rather than continuing with judicial determination on a case-by-case basis.[21] Although there are numerous state statutes which allow electronic eavesdropping for law enforcement purposes, most of them would not meet Fourth Amendment standards as set by the Supreme Court.[22] It appears that action at the federal level would be the most appropriate at the present time. Congress should place in such a statute proper safeguards for the right of privacy of the individual. In order to meet the requirements of the Fourth Amendment, such a statute must require that even court ordered electronic surveillance be "discriminate" and "particularistic." A society which values the individual's right of privacy will not tolerate the unrestricted use of electronic surveillance. Uncontrolled electronic surveillance is pervasive and indiscriminate and an affront to personal dignity. It is believed that the adoption of such statutory controls and their enforcement by an informed judiciary will adequately protect from indiscriminate electronic surveillance the individual's right of privacy.[23]

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[21] Ibid. ; Gary L. Davis, "Electronic Surveillance and the Right of Privacy," 27 Montana Law Review 173 (1966).

[22] _____, "Electronic Eavesdropping," 56 Illinois Bar Journal 998 (1968).

[23] Davis, "Electronic Surveillance," 22 Montana Law Review 173 (1966).

Finally, in 1967, after years of struggling with the relationship of the Fourth Amendment to electronic surveillance, the Supreme Court in Katz v. United States, 389 U.S. 347, applied the Fourth Amendment as a protection against electronic eavesdropping.[24]

In Katz the Court turned away from the outdated "physical trespass" doctrine first applied to electronic eavesdropping in the Goldman decision. The majority maintained that the Fourth Amendment did not provide a general right of privacy, but it did protect an individual's right of privacy when he asserted a wish to have privacy, if society regarded this assertion as reasonable.[25]

With the Katz decision the Court has effectively changed the application of the Fourth Amendment as a limitation on electronic eavesdropping. In doing so it has swept away old standards, and clarified others.[26] It is evident from the devel-

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[24] _____, "Berger v. New York and Katz v. United States: A Commentary," 21 Alabama Law Review 120 (1968).

[25] _____, "From Private Places To Personal Privacy: A Post-Katz Study of the Fourth Amendment," 43 NYU Law Review 968 (1968); Taylor Hicks, Jr., "Fourth Amendment and Electronic Eavesdropping: Katz v. United States," 5 Houston Law Review 990 (1968); E.W. Kitch, "Katz v. United States: The Limits of the Fourth Amendment," Supreme Court Review 1968: 133; E.F. Ryan, "United States Electronic Eavesdrop Cases," 19 Univ. of Toronto Law Journal 68 (1969).

[26] Edwin F. Hendricks, "Eavesdropping, Wiretapping, and the Law of Search and Seizure--Some Implications of the Katz v. United States Decision," 9 Arizona Law Review 428 (1968).

opment of the law and the course the Court is taking that it has been and still is struggling with the concept of the "right of privacy" for the individual and whether this right is absolutely guaranteed against unreasonable searches and seizures by the Fourth Amendment. While the Court is still struggling with this problem, in the Katz decision the Court has observed that the strictest standards need to be adopted for the use of electronic surveillance, so that the individual who is not criminally oriented will be protected against unwarranted intrusions by law enforcement officials. It is the innocent citizen who really suffers through the indiscriminate use of electronic surveillance.[27]

It is suggested by the literature in the field that the Supreme Court had two objectives in mind when it handed down its decision in the Katz case. These were: (1) to limit the amount of official surveillance and (2) to bring electronic surveillance under judicial scrutiny.[28]

The first objective of the Court--to limit the amount of official electronic surveillance--has had a minimal affect

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[27]Mary E. Bisantz, "Electronic Eavesdropping Under the Fourth Amendment--After Berger and Katz," 17 Buffalo Law Review 455 (1968); Herman Schwartz, "The Legitimation of Electronic Eavesdropping: The Politics of Law and Order," 67 Michigan Law Review 455 (1969).

[28]Robert M. Pitler, "Eavesdropping and Wiretapping--the Aftermath of Katz: A Comment," 34 Brooklyn Law Review 233 (1968); _____, "Berger and Katz: A Commentary," 21 Alabama Law Review 120 (1968).

on law enforcement use of electronic surveillance. Moreover, since the Katz decision, Congress has seen fit to authorize the almost unlimited use of electronic surveillance in gathering evidence about the commission of certain offenses which are enumerated in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. However, the limiting effect of having to obtain a court order has diminished the use of electronic surveillance by law enforcement agencies.[29]

The second objective of the Court--to bring electronic eavesdropping under the scrutiny of the courts--was accomplished. If the government agents who wish to use some type of electronic surveillance would only take time to get antecedent judicial authorization they could be completely within the bounds of the Fourth Amendment provided their electronic surveillance is "discriminate" and "particularistic." The Court's rationale in bringing electronic eavesdropping under the watchful eyes of the courts was to curb potential abuses of the progressing technology in the field of electronic eavesdropping.[30]

With the Katz decision the Court overruled forty years of precedent that denied Fourth Amendment protection to

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[29]Samuel Dash, "Katz--Variation On a Theme By Berger," 17 Catholic Univ. Law Review 296 (1968).

[30]Jeffrey R. Fuller, "Constitutional Law: The Validity of Eavesdropping Under the Fourth Amendment," 51 Marquette Law Review 96 (1967).

victims of electronic eavesdropping where such eavesdropping did not constitute an "actual physical trespass" into the home or business. This decision was, however, merely suggestive rather than definitive; it settled the immediate problem, while leaving unsettled future problems, such as what exactly constitutes legal electronic eavesdropping. This problem, however, was later settled by the Omnibus Crime Control and Safe Streets Act of 1968.

The overall affect of the Katz decision was to reinterate that the Fourth Amendment permits only a narrowly circumscribed search and seizure of specific items, whether tangible or intangible, in order that the action be constitutional.[31]

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[31] _____, "Electronic Eavesdropping--What the Supreme Court Did Not Do?" 4 Criminal Law Bulletin 83 (1968).

CHAPTER III

We have seen that for the past four decades the Supreme Court has been increasingly involved with the problem of electronic eavesdropping. This involvement was partly a reflection of the general trend of increasing Court control over police practices and partly a result of public concern over the obvious threats of widespread electronic surveillance. In a series of cases beginning in 1928, the Court had dealt with the issue of whether electronic eavesdropping was a "search and seizure" within the meaning of the Fourth Amendment to the United States Constitution.

With the case of Katz v. United States[1] the Court began a reevaluation of the constitutional criteria in the area of electronic eavesdropping. This case institutes significant changes in the application of the Fourth Amendment to limit electronic surveillance by law enforcement agencies. The purpose of the present chapter is to review these new criteria for electronic eavesdropping under the Fourth Amendment. Before getting to an analysis of the Katz decision, it seems necessary to provide a brief outline of the basic holdings in the area of electronic eavesdropping.

The first case to come before the Court was that of

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[1] 389 U.S. 347 (1967).

Olmstead v. United States.[2] This was a wiretapping decision, but nevertheless, it opened the door to the whole area of electronic eavesdropping which includes wiretapping. The Court held in the Olmstead case that conversations were intangibles and were not within the protection of the Fourth Amendment; the Fourth Amendment applied only to the seizure of tangible objects.[3] Even though this was a wiretapping decision, it is obvious how it applies to non-telephonic electronic eavesdropping.

Goldman v. United States[4] was the first case to reach the Court concerning "bugging" or non-telephonic electronic eavesdropping. In this decision the Court focused on the absence of a physical trespass and held that in such instances the Fourth Amendment did not apply.[5]

In 1952 the Court again ruled on litigation involving bugging in On Lee v. United States.[6] The Court, as in Goldman, relied on the absence of a physical trespass on the defendant's property, in holding that there had been no violation of the Fourth Amendment.[7]

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[2]277 U.S. 438 (1928).

[3]Ibid., 454.

[4]316 U.S. 129 (1942).

[5]Ibid., 134.

[6]343 U.S. 747 (1952).

[7]Ibid., 752.

Not until 1961 did the Court apply the Fourth Amendment to an eavesdropping situation. In Silverman v. United States[8] the Court held that since there had been an actual physical trespass on the property of the defendant, a "spike-mike" driven through a party wall, that the Fourth Amendment did provide protection for the defendant's constitutional rights. In the words of the Court, there had been an ". . . actual intrusion into a constitutionally protected area."[9] During the same term, in another case, the Court ruled that intangibles such as spoken words could be the object of a search and seizure within the meaning of the Fourth Amendment.[10]

Before Katz, the last decision handed down in this area was Lopez v. United States.[11] Here, the Court dismissed the defendant's claims by saying that there had been no trespass; thus, no violation of the Fourth Amendment.[12]

Thus, from 1928 to 1967, the Court relied on the presence of an "actual physical trespass" as the primary criterion for applying the Fourth Amendment to electronic eavesdropping. At this point let us turn to an examination of the Katz decision.

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[8] 365 U.S. 505 (1961).

[9] Ibid., 512.

[10] Wong Sun v. United States, 371 U.S. 471 (1963).

[11] 373 U.S. 427 (1963).

[12] Ibid., 439.

Katz was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with the interstate transmission of wagering information. At his trial, the Government was allowed, over defendant's objections, to introduce recorded evidence of the defendant's end of telephone conversations, overheard by FBI agents who attached an electronic listening and recording device to the outside of a public telephone booth from which the defendant frequently made calls. In affirming Katz' conviction, the Ninth Circuit Court of Appeals rejected the contention that the recorded evidence had been obtained in violation of the Fourth Amendment. The Court of Appeals relied mainly on the constitutional requirement of a physical trespass. Since there had been no physical trespass into the telephone booth by the FBI agents, the Circuit Court found no violation of the Fourth Amendment.[13]

The Supreme Court, on certiorari, reviewed the case, Justice Stewart writing for the majority. Katz' conviction was reversed by a seven-to-one vote of the Court, Justice Marshall taking no part in the decision for unstated reasons.

Katz' attorney framed the constitutional issues involved in the following manner: (a) the telephone booth was a con-

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[13]389 U.S. 347, 348-9 (1967).

stitutionally protected area and moreover, the right of privacy of the user was violated when the agents recorded the private conversations; (b) even though there was no actual physical penetration of the telephone booth, the search and seizure was a violation of the Fourth Amendment.[14]

Justice Stewart quickly disposed of the defendant's formulation of the issues by saying that the idea of certain areas being constitutionally protected by the Fourth Amendment is erroneous and not the solution to Fourth Amendment problems. In addition, he maintained that ". . . the Fourth Amendment cannot be translated into a general constitutional right to privacy." Stewart also stated at the outset that the Fourth Amendment protects individual privacy from certain types of governmental intrusions, but it also protects individuals from governmental intrusions that have nothing to do with the right to privacy. For the most part, the laws of the individual states are responsible for protecting their citizen's general right to privacy or the right to be let alone by other people.[15]

The Court rejected the two main contentions of the Government quite handily--these were: (a) that the phone booth was not a constitutionally protected area and therefore, was not entitled to Fourth Amendment protection and (b) that the

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[14] Ibid., 349-50.

[15] Ibid., 350-51.

listening device did not penetrate the phone booth in any way, thereby not constituting a physical trespass. The Government's first contention was disposed of in short order when Justice Stewart observed that even though the Court had used this terminology in previous eavesdropping cases, it had no bearing on the present case, because the Fourth Amendment

> . . . protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[16]

The Government then stressed the fact that the phone booth was constructed partly of glass, through which anyone could easily see. The Court rejected this argument on the grounds that when Katz entered the phone booth, he was seeking to exclude, ". . . not the intruding eye--but . . . the uninvited ear." According to the Court, anyone who enters a phone booth, closes the door behind him and pays the toll, is entitled to be somewhat confident that his end of the conversation will not be broadcast to the world.[17]

The Government then urged that the Fourth Amendment should not be controlling here since there was no physical penetration of the phone booth. The Court admitted that at

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[16] Ibid., 351.

[17] Ibid., 352.

one time a physical trespass had been necessary to bring the action within the purview of the Fourth Amendment. However, the current interpretation was that the Fourth Amendment protects people--and not just areas--against unreasonable searches and seizures. It was quite evident that the reach of the Fourth Amendment could not be limited by the presence or absence of a physical penetration into private property.[18]

The Court, after four decades, proceeded to bury the Olmstead and Goldman doctrines saying:

> We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the phone booth can have no no constitutional significance.[19]

The Court branded this intrusion a search and seizure within the meaning of the Fourth Amendment. The only remaining question to be answered was whether this search and seizure was unreasonable. The Government contended that the search and seizure was entirely defensible in terms of the way the intrusion was conducted. The agents did not begin their surveillance of Katz' conversations until they had sufficient

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[18] Ibid., 353.

[19] Ibid.

cause to believe that he was involved in the interstate transmission of wagering information, in violation of federal law. Moreover, the scope and duration of the surveillance was limited to the purpose of establishing the contents of the defendant's illegal conversations. The surveillance was confined to brief periods during which only the defendant was using the telephone booth. Great care was taken so that no one else was overheard.[20]

The Court then urged that this manner of electronic surveillance could be legally authorized when certain steps are taken prior to the intended surveillance. The opinion reads in part:

> Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need of such an 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.[21]

In fact during the previous term of Court, it was held in Osborn v. United States[22] that such an authorization was entirely constitutional. The Court pronounced that under sufficiently "precise and discriminate circumstances," a federal court may grant government agents the authority to

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[20] Ibid., 354.

[21] Ibid.

[22] 385 U.S. 323 (1966).

use electronic surveillance "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense."[23]

The Government's last contention pointed up the fact that the agents had done no more than they could have been authorized to do with prior judicial sanction, and that their actions should be validated retroactively. The Court observed that because the restraint was self-imposed, rather than by a neutral magistrate, it could not be sustained. The opinion reads:

> In the absence of such safeguards this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. . . . [S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.[24]

Before commenting on the significance of this decision, it would be worthwhile to examine the concurring opinions of Justices Harlan, White, and Douglas, and the dissenting opinion of Justice Black.

Justice Harlan based his concurrence on the following reading of the majority opinion: (a) that an enclosed tele-

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[23] Ibid., 329-30.

[24] 389 U.S. 347, 356-7.

phone booth is an area or place that is constitutionally protected if the user exhibits a reasonable expectation of privacy; (b) that electronic surveillance as well as a physical intrusion into the above described area may constitute a violation of the Fourth Amendment; (c) that an intrusion into a constitutionally protected area is per se unreasonable without a search warrant.[25] He did not, however, interpret the opinion to mean

> . . . that no interception of a conversation one-half of which occurs in a telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand exceptions, [however] , . . . I agree with the Court that this is not one.[26]

Justice White also agreed with the result reached by the majority, in that the official surveillance of the defendant's telephone conversations must be subjected to the test of reasonableness under the Fourth Amendment. He also urged that in this instance there should have been prior judicial authorization in order to meet the requirements of the Fourth Amendment.[27]

While the Court noted some exceptions to search warrant procedure, the question of the use of electronic surveillance in cases of a threat to national security was not pursued.

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[25] Ibid., 360.

[26] Ibid., 362.

[27] Ibid., 363.

White asserted that in national security matters the warrant procedure could be bypassed. He stated in part:

> We should not require the warrant procedure and the magistrate's judgement if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.[28]

The concurring opinion of Justice Douglas was written as a reply to that of Justice White, otherwise Douglas was in agreement with the majority. Douglas viewed White's concurrence as a ". . . wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping . . ." without benefit of prior judicial authorization in ". . . cases which the Executive Branch itself labels 'national security' matters."[29] Douglas urged that the Executive Branch did not qualify as taking the place of a magistrate, for the President was not a disinterested, neutral party. Moreover, under the system of government that we operate, the President was not supposed to be a detached party. Accordingly, the Executive Branch should

> . . . vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and the Attorney General are properly interested parties, cast in the role of adversary, in national security cases.[30]

Justice Black wrote the only dissent in this decision.

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[28] Ibid., 364.

[29] Ibid., 359.

[30] Ibid., 360.

His objection to the majority opinion was twofold: (1) he did not believe that the words of the Fourth Amendment meant what the majority held them to mean; (2) he believed that it was not the proper role of the majority to rewrite the Fourth Amendment "to bring it into harmony with the times" to reach what seemed to be a desired result. The first objection was based on the wording of the Amendment itself? Black maintained that the Fourth Amendment protected against the seizure of tangible objects which have ". . . size, form, and weight . . ." and spoken words have none of these qualities; thus, he concluded ". . . that the Fourth Amendment simply does not apply to eavesdropping . . . ."[31] The second objection was based on his confidence in the Framers of the Constitution. He believed that if the Framers had intended the Fourth Amendment to apply to eavesdropping they would have written such provisions into it. He stated in part:

> There can be no doubt that the Framers were aware of this practice [eavesdropping] , and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment.[32]

Black went on to point up the fact that until the case of Berger v. New York[33] the Court had no disposition to construe

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[31] Ibid., 364-66.

[32] Ibid., 366.

[33] 388 U.S. 41 (1967).

the Fourth Amendment in such a manner. He reviewed the majority opinions in the Olmstead and Goldman cases to point up the Court's reluctance to apply the Fourth Amendment to the seizure of intangible "conversations." This dissent came as no surprise to one who is familiar with Justice Black's constitutional pronouncements. He interprets the Bill of Rights to mean exactly what it says and nothing more. He seems to place more reliance on "the wisdom of the Framers" than do most of the members of the Court.

Now that the important aspects of this decision have been reviewed, it will be necessary to give certain parts a more detailed treatment.

The first area of comment is an attempt on the part of the writer to provide justification for the Court's abandoning of the "trespass" doctrine. This was done for the following reasons: (1) the "trespass" doctrine did not provide a satisfactory basis for the application of the Fourth Amendment to electronic surveillance cases and was based on an absurd distinction; (2) the rule led to confusion--it was based on the physical penetration of a "constitutionally protected area." The problem was that no one (not even the Supreme Court) could or would define a "constitutionally protected area;" (3) the "trespass" rule was inconsistent with modern concepts of Fourth Amendment protection. Let us now take a closer look at this reasoning.

The "trespass" doctrine was a product of the Court's grasping for criteria with which to apply the Fourth Amendment in the area of electronic eavesdropping. Since the Fourth Amendment required an actual physical trespass, it was necessary to adopt this standard of application in electronic eavesdropping cases.[34] Thus, the Court came up with the idea that if a defendant's property was subjected to even the slightest "trespass" that he could be protected against such an intrusion by the Fourth Amendment.[35] This distinction has since become an absurdity due to technological advances in the area of electronic surveillance.

Secondly, the pronouncement by the Court that the Fourth Amendment provided protection only against an "actual intrusion into a constitutionally protected area" created a vast amount of confusion.[36] What is a constitutionally protected area? Is it a house, car, office, or is it anywhere a person desires privacy? In the Katz decision, the Court discarded the idea of a constitutionally protected area and replaced it with a test of reasonableness which will be discussed below.

The last reason--that the trespass rule is inconsistent

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[34] Olmstead v. United States, 277 U.S. 438 (1928).

[35] Silverman v. United States, 365 U.S. 505 (1961).

[36] Ibid.

with modern concepts of Fourth Amendment protection--was a salient factor in this decision. Historically, the Fourth Amendment's protection against an unreasonable search and seizure has been primarily oriented toward the protection of private property. However, in 1967, before the Katz decision, the Court had demonstrated its willingness to apply the Fourth Amendment to the protection of privacy in addition to property.[37] In the words of the Court:

> The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts . . . .[38]

It will be remembered, however, that in the Katz decision the majority denied that the Fourth Amendment provided for a general right to privacy.[39]

Since it is clear that the trespass doctrine has been abandoned, it is now our task to determine how the Court has replaced it. On first reading the Katz decision it would seem that the Court has not spelled out any new criterion for the application of the Fourth Amendment to eavesdropping cases. However, if one reads closely it is not difficult to determine

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[37] Warden v. Hayden, 387 U.S. 294 (1967).

[38] Ibid., 304-5.

[39] 389 U.S. 347, 350.

what the new test is--it is the test reasonableness or reasonable expectation of privacy. According to the Court, an individual who has exhibited a reasonable expectation of privacy has the right to be protected by the Fourth Amendment, if that expectation is one that society is prepared to recognize as reasonable. Therefore, no matter where an individual may be, if he exhibits a subjective expectation of privacy, he will be able to claim the protection of the Fourth Amendment against unreasonable searches and seizures.[40] But if the individual does not exhibit this expectation or if society regards this expectation of privacy as unreasonable, the individual assumes the risk that his incriminating statements might be overheard. In the latter instance, protection under the Fourth Amendment cannot be claimed.

The test of reasonableness is not an entirely new phenomenon conjured up by the Court for the benefit of the Katz decision. As early as the Olmstead case, Chief Justice Taft stated:

> The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment.[41]

Thus, in the Olmstead decision one finds similar rationale as that used by the Warren Court in Katz. What it all comes

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[40] Ibid., 361.

[41] 277 U.S. 438, 445.

down to is that anyone who speaks out in public should expect to be heard and should not expect to be able to claim protection under the Fourth Amendment.

In conclusion, it is the opinion of the writer that the goal and primary thrust of the Katz decision was to bring official electronic surveillance under the control of the courts. This was accomplished by the requirement that future electronic surveillance must have prior judicial authorization and continuous scrutiny by the court that issued the eavesdrop order. The Supreme Court has now effectively placed official electronic surveillance under judicial scrutiny in order to prevent potential abuses of these techniques. The majority took great pains to emphasize the necessity of obtaining prior judicial approval and also, the fact evidence obtained through the use of illegal electronic surveillance would be inadmissable in most instances.

CHAPTER IV

Since the Katz decision in 1967, there have been two major developments in the area of electronic eavesdropping: one was the passage of the Omnibus Crime Control and Safe Streets Act of 1968[1] and the other was a recent Supreme Court decision in the case of Alderman v. United States.[2] Let us first look at the provisions of the Omnibus Crime Control and Safe Streets Act as applied to official electronic surveillance.

Title III of the Act is the portion that deals with the regulation of private and official electronic surveillance. Title III prohibits all electronic eavesdropping by private parties under penalty of $10,000 fine and/or five years in prison.[3] It also prohibits the manufacture, distribution, possession, sale, or advertising of electronic eavesdropping devices in interstate commerce.[4]

In perhaps its most important provision, Title III provides for the granting of prior judicial authorization for electronic eavesdropping for law enforcement purposes by any duly constituted court of law. However, before a

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[1] Title III, 87 Stat. 197 (1968).

[2] 89 Sup. Ct. 961 (1969).

[3] Title III, 87 Stat. 197, sec. 2511 (d).

[4] Ibid., sec. 2512.

judge grants the eavesdropping order, he must ascertain from the investigating officer the following information: who is the investigating officer; what offense is involved and who is suspected of committing it or of being about to commit it; what facilities are to be intercepted; what type of conversations are being sought; what alternative methods could be used; and the length of time that is required for the interception.[5]

In addition to the above, the judge may require other information from the investigating officer. It would seem that Congress had misgivings about this new power of the police, because it added certain "safeguards" to the procedure. A judge may demand progress reports of the investigating officer. When the electronic surveillance is stopped or completed, the subject of the surveillance must be notified, unless the judge waves the requirement "on good cause." The tapes or transcripts which contain the information gathered during the electronic surveillance must be turned over to the judge by the investigating officer; the judge must retain these tapes for a minimum of ten years. In addition to retaining the tapes, the judge must submit a formal report of the surveillance to the Administrative Office

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[5]Ibid., sec. 2518.

of the United States Courts. Each January the Attorney General must submit a similar report to the Administrative Office concerning the results of interceptions; each April the Administrative Office forwards the compiled reports to Congress. After six years, a commission will report to the President and to Congress on the effectiveness of Title III.[6]

Title III also specifies the range of federal and state crimes for which electronic surveillance is permissable.[7] Federal law enforcement officers are authorized to eavesdrop for such offenses as bribery of public officials, offering kickbacks to influence the operation of employee benefit plans, bankruptcy fraud, extortionate credit transactions, and "any offense involving the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marijuana, or other dangerous drugs . . . ."[8]

Authorization for state officers is even broader. In addition to those mentioned are desertion of wife or child, graveyard desecration, endangering the life of a railroad

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[6] Ibid., sec. 2519.

[7] For the complete list of crimes, see Appendix B.

[8] Ibid., sec. 2516 (e).

passenger, illicit cohabitation, carrying a concealed weapon, cruelty to animals, and gambling.[9]

Another portion of Title III, section 2518, allows "any investigator or law enforcement officer" in emergency cases of "national security" or "organized crime" to eavesdrop for forty-eight hours without prior judicial authorization. It would seem that Congress agrees to a certain extent with that portion of Justice White's concurring opinion in the Katz decision. White would allow unauthorized electronic surveillance in cases of national security in an unlimited manner so long as the President or the Attorney General has deemed such surveillance necessary. Section 2518 also permits the use of electronic surveillance by non-law enforcement bodies such as Senate and House Committees under the same restrictions as law enforcement agencies.

It should be observed that nowhere in the list of crimes are those such as rape, theft, or mugging--those crimes of the street about which the public is more concerned and which moved Congress to vote for "law and order." However, these crimes are hardly of such a nature to allow effective electronic surveillance, for it is quite obvious that a

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[9] Ibid.

rapist or a purse-snatcher would hardly discuss his intended crime with anyone before he commits it.

Nevertheless, for those crimes listed, electronic surveillance would be quite an effective tool which should result in more effective law enforcement and a higher conviction rate. So would judicious use of the thumbscrew and the rack, but the evil of such techniques outweigh their value to law enforcement. It is suggested that electronic eavesdropping be given like consideration.

So far all that has been discussed is what the police can do with the technique of electronic surveillance; what protection does Title III provide for the victim of an unlawful eavesdrop? The "aggrieved person" clause permits an individual to sue, if as an eavesdrop victim, he feels that he has been overheard unjustly. But this right applies only to persons who are actually overheard, or one against whom the eavesdrop is directed. The subject of an incriminating conversation, if a third party, has no relief.[10] Nor can a person challenge an interception if it is made with the consent of one of the parties to the conversation. Also permissable is surrepititious monitoring by one party to the conversation "not acting under color of law"--a provision

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[10] Ibid., sec. 2518 (10).

which may cripple, if is does not destroy, the ban on electronic surveillance by the private citizen.

A particularly disturbing provision of Title III is the long surveillance period which it authorizes--up to thirty days, renewable indefinitely every thirty days.[11] This is unusual because even conventional searched lasting only a few hours have been condemned by the courts. A law enforcement officer with a conventional search warrant cannot enter a private home and embark upon a search lasting several days. The wisdom of this particular provision should be considered in light of the Katz decision; it would seem that if this provision were litigated in the Supreme Court, it would probably be declared an unreasonable search and seizure and thus, unconstitutional.

Moreover, in the face of the Katz decision, the constitutionality of Title III in its entirety should be considered. Because of the apparent ease in which prior judicial authorization for electronic surveillance can be obtained, Title III seems to not only violate the Fourth Amendment's protection against unreasonable searches and seizures and the Fourteenth Amendment's due process clause but also the First Amendment's guarantee of freedom of speech. Without privacy of communication, people are reluctant to exercise their right

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[11] Ibid.

of free speech.

The other development in the field of electronic eavesdropping to be considered here occurred last March, when the Court, in the case of Alderman v. United States,[12] handed down a decision which stunned law enforcement officials.

Alderman was prosecuted for conspiracy to transmit in interstate commerce communications consisting of threats to injure and murder. The United States District Court for the District of Colorado rendered judgement against Alderman and he appealed. The Court of Appeals for the Tenth District affirmed and the Supreme Court denied certiorari, 389 U.S. 834. On petition for rehearing, 390 U.S. 136, certiorari was granted and the case was remanded to the district court. The other petitioners were convicted in the United States District Court for the District of New Jersey of conspiring to transmit to a foreign power information concerning national security. The Third Circuit Court of Appeals affirmed the convictions and the Supreme Court granted certiorari.[13]

In the cases before the Court each petitioner demanded retrial if any of the evidence used to convict them was the product of an unlawful electronic eavesdrop, regardless of

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[12] 89 Sup. Ct. 961 (1969).

[13] Ibid.

whose Fourth Amendment rights were violated by the surveillance. It was urged by the petitioners that if the evidence was inadmissable against any one conspirator, because it was tainted by illegal electronic surveillance as to him, it is also inadmissable against his co-conspirator or co-defendant.[14]

The Court, in an opinion by Justice White, rejected the petitioners' interpretation of the Fourth Amendment because of its inconsistency with precedent. The Court observed:

> The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence, co-conspirators and co-defendants have no special standing.[15]

In the cases being heard, any petitioner would be able to move to suppress the evidence against him, if it was obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. Such a violation said the Court ". . . would occur if the United States unlawfully overheard conversations of the petitioner himself or conversations occurring on his premises, whether or not he was present or participated in these conversations."[16]

The remaining portion of the opinion dealt with the procedures to be followed by the District Court in resolving

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[14] Ibid., 965.

[15] Ibid.

[16] Ibid., 968.

the ultimate issue which will be before it--whether the evidence against any petitioner grew out of his illegally overheard conversations occurring on his premises. The Court informed the Government that it must disclose to the petitioners for examination any surveillance records which are relevant to the decision of the issue at hand, even though this disclosure might constitute a potential threat to the reputation of third parties or a potential danger to national security. The Government's alternative to the disclosure of the surveillance records was to drop the charges against the petitioners.[17]

Justice White instructed the District Court to

> . . . confine the evidence presented by both sides to that which is material to the question of a possible violation of a petitioners' Fourth Amendment rights, to the content of the conversations illegally overheard by surveillance which violated these rights, and to the relevance of such conversations to the petitioners' subsequent convictions.[18]

If the District Court found a violation of Fourth Amendment rights which resulted in the subsequent conviction of any petitioner, it was to conduct a new trial, and of course, exclude the evidence obtained through the use of illegal electronic surveillance.[19]

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[17] Ibid., 968-9.

[18] Ibid., 973-4.

[19] Ibid., 974.

The overall effect of this decision is to afford for the first time to a third party, who is the subject of an incriminating conversation, the protection of the Fourth Amendment, provided that the injured third party is the owner of the premises on which the illegal electronic surveillance took place. This is somewhat a departure from previous constitutional pronouncements concerning the rights of a third party who had been the subject of an incriminating conversation.

CONCLUSION

With the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress has established both procedural and substantive standards for the use of electronic surveillance by law enforcement and security agencies. It remains to be seen, however, what the reaction of the Supreme Court will be to these legislatively sanctioned procedures.

At this writing no case involving Title III has reached the Court. An analysis of the opinions of the present members of the Court in those cases in which similar issues arising out of analogous legislation were before the Court will be helpful in seeking to project the probable interpretation

which the present Court might place on key provisions of Title III.

Let us consider the opinion of the Court in Berger v. New York.[20] Here the Court construed a New York statute of 1939 which allowed for the issuance of court orders authorizing electronic surveillance by law enforcement officials.[21] Before a court could issue an eavesdrop order, however, the requesting officer was required to show "reasonable ground" that evidence of a crime could be obtained. The relevant portion of the New York statute is very similar to the provisions of Title III; thus, the reasoning of the Court in the Berger decision might be indicative of its interpretation of the provisions of Title III.

Justice Clark, speaking for the majority in Berger, held that the New York statute was "too broad in its sweep resulting in a trespassory intrusion into a constitutionally protected area." Justice Clark indicated, however, that properly drawn eavesdrop statutes could meet Fourth Amendment requirements, but he failed to define a "properly drawn statute," except for saying that it must be discriminate and particular in its scope. More specifically, the majority objected to the New York statute on four basic points: (1) the statute authorized the issuance of eavesdrop orders on

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[20] 388 U.S. 41 (1967)

[21] N.Y. Code Crim. Proc., sec. 813-a (1939).

"reasonable ground" that evidence of a crime could be obtained not requiring the belief that a particular offense would be committed; (2) the two-month authorization period was equivalent to a series of intrusions, searches, and seizures following a single showing of probable cause; (3) the statute allowed too much discretion on the part of the investigating officer in that it placed no termination on the surveillance once the evidence sought was obtained; (4) the statute had no requirement of notice, nor did it overcome that defect by requiring some special showing of facts. In short, the statute's broad authorization to eavesdrop was without adequate supervision or protective procedures.[22]

Justice Douglas concurred in a separate opinion "because at long last [the Court] overrules sub silentio Olmstead v. United States . . . and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment."[23] Douglas maintained that electronic surveillance which collects evidence and/or provides leads to evidence cannot be constitutional under the Fourth Amendment.[24]

Justice Stewart also concurred in the result of the Court while dissenting as to the reasoning of the majority. While

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[22] 388 U.S. 41, 55-60.

[23] Ibid., 64.

[24] Ibid., 67.

Stewart agreed with the dissenters as to the constitutionality of the New York statute and the electronic surveillance permitted by it, he maintained that the electronic surveillance in the present case was unconstitutional because the affidavits presented did not constitute a sufficient showing of probable cause as to justify a broad invasion of sixty days. Justice Stewart was looking at the facts of the particular case, while the majority struck down the entire statute because of the unconstitutionality of all its provisions.[25] This case-by-case approach was also suggested by the other dissenters: White, Harlan, and Black.

Justice White perceived the issue in Berger to be whether or not "this search complied with Fourth Amendment standards?" He maintained that it did, and should have been held constitutional. White accused the Court of attempting to declare all wiretapping and other electronic eavesdropping constitutionally impermissable by laying down requirements for legalized electronic surveillance which are practically impossible to meet. White further pointed up the importance of electronic surveillance to effective law enforcement. It would seem that Justice White would be in favor of similar federal legislation.[26]

Justice Harlan looked at the problem of reasonableness

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[25] Ibid., 67.

[26] Ibid., 110.

in legalized electronic surveillance in the following manner:

> . . . any limitations, for example, necessary upon the period over which eavesdropping may be conducted, or upon the use of intercepted information unconnected with the offenses for which the eavesdropping order was first issued, should properly be developed only through a case-by-case examination of the pertinent question. It suffices here to emphasize that in my view electronic eavesdropping as such or as it is permitted by this statute is not an unreasonable search and seizure.[27]

Justice Black, in his usual absolutist manner, maintained that neither the Fourth nor any other Amendment banned the use of evidence obtained through the use of electronic surveillance. To put it in his words:

> Had the Framers of this Amendment desired to prohibit the use in court of evidence secured by an unreasonable search and seizure, they would have used plain, appropriate language to do so, just as they did in prohibiting the use of enforced self-incriminating evidence in the Fifth Amendment . . . . So I continue to believe that the exclusionary rule formulated to bar such evidence in the Weeks case is not rooted in the Fourth Amendment but rests on the 'supervisory power' of this Court over the other federal courts . . . . For these reasons . . . I do not believe that the Fourth Amendment standing alone, even if applicable to electronic eavesdropping, commands the exclusion of the overheard evidence in this case.[28]

It would seem that a majority of the members of the Court would frown on a federal statute similar to that of New York. The question is: Does Title III have enough procedural and substantive guarantees to bring it within

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[27] Ibid., 101.

[28] Ibid., 76.

constitutional bounds? One author maintains that since the requirements for the issuance of electronic eavesdropping orders were lifted, for the most part, verbatim from the majority opinion in Berger that Title III will present no real constitutional problems in the future.[29] While this may very well be correct, there are two aspects of Title III that might possibly lead to future problems. These are the length of time during which electronic surveillance is allowed and the absence of the requirement of notice of the search before the surveillance begins.

Title III allows an initial period of thirty days, renewable every thirty days, for electronic surveillance. Even though this is but half of that allowed by the New York statute, it still constitutes a broad invasion of privacy, even of a specified place. In light of the Berger decision, it would seem that the Court would look more favorably on a shorter, more discriminate period of time.

The second potential problem is the absence of notice. In conventional searches, the person whose premises are to be searched must be put on notice before the search begins. Title II does require, however, that notice be given after the search ends. The majority in Berger held that notice must be given prior to the search and if this is not done

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[29] M. Glenn Abernathy, "Recent Developments in the Law of Search and Seizure," p. 12. (Panel Paper, Southern Political Science Association, Gatlinburg, Tennessee, November 9, 1968).

some special showing of facts must be made in order to obtain a warrant for the eavesdrop. Title III requires neither of these conditions and in the eyes of the present Court this may well result in a decision declaring the lack of these safeguards to constitute a violation of the Fourth Amendment.

Finally, it is believed that Title III as a whole will cause no constitutional problems due to the specificity of its provisions, but if either of the above mentioned aspects of Title III arises as a specific issue, the Court would probably reverse the conviction, not withstanding the present trend of Court appointees who are conservative on the issue of law and order.

Thus we see that Congress has attempted in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 to define the prodedures by which electronic eavesdropping may be used by law enforcement officers in specific cases without violating constitutional provisions. Once before, in 1928, Congress had a similar task thrust upon them by the Court's opinion in the Olmstead case. The result was section 605 of the Federal Communications Act of 1934 dealing with the practice of wiretapping. At that time the Court held wiretapping to be beyond the purview of the Fourth Amendment.

Today, the Court has broadened the "search and seizure" provision of the Fourth Amendment to include protection of the "right of privacy" against an unreasonable search and seizure through electronic surveillance. It would seem, then, that the provisions of Title III must wait for "validation" by the Court before they can be regarded by law enforcement officials as effective tools in the system of criminal justice.

APPENDIX A

Section 605. Unauthorized Publication or Use of Communications

No person receiving or assisting in receiving, or transmitting or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent or attorney, or to a person employed or authorized to forward such communication to its destination or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own use or the benefit of another not being entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or the benefit of another not entitled thereto; Provided, that this section shall not apply to receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

APPENDIX B

Section 2516. Authorization For Interception of Wire or Oral Communications

(1) The Attorney General, or any Assistant Attorney General specifically designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with Section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of an offense as to which the application is made when such interception may provide or has provided evidence of--

(a) any offense punishable by death or by imprisonment for more than one year under sections 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), or under the following chapters of this title: chapter 37 (relating to espionage), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments or loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 201 (bribery of public officials and witnesses), section 224 (bribery in sporting contests), section 1084 (transmission of wagering information), section 1503 (influencing or injuring an officer, witness, or juror generally), section 1510 (obstruction of criminal investigations), section 1751 (Presidential assassinations, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate or foreign travel or transportation in aid of racketeering enterprises), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plans), section 659 (theft of interstate shipment), section 664 (embezzlement from pension or welfare funds), or sections 2314 and 2315 (interstate transportation of stolen property);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving bankruptcy fraud or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marijuana, or other dangerous drugs, punishable under the law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title; or

(g) any conspiracy to commit any of the foregoing offenses.

(2) The principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make applications to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing or approving the interception of wire or oral communications by investigative or law enforcement officers having the responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crimes dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

APPENDIX C

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