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## ELECTRONIC SURVEILLANCE BY LEAVE OF THE MAGISTRATE: THE CASE IN OPPOSITION

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### I. FROM TRESPASS TO ELECTRONIC INVASION

Intrusions upon the privacy of communication are no recent phenomenon attributable to the twentieth century's conspicuous lack of decorum. Blackstone long ago laid it down that "[E]aves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance" punishable at common law.<sup>1</sup> Only the techniques of intrusion have become more sophisticated.<sup>2</sup>

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<sup>1</sup> 4 W. BLACKSTONE, COMMENTARIES \*168.

<sup>2</sup> For a discussion of the techniques of wiretapping and bugging, see R. BROWN, *THE ELECTRONIC INVASION* (1967); S. DASH, R. SCHWARTZ & R. KNOWLTON, *THE EAVESDROPPERS* (1959); B. SPINDEL, *THE OMINOUS EAR* (1968); A. WESTIN, *PRIVACY AND FREEDOM* (1967). The following brief summary of technological innovations appears in Note, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework*, 50 MINN. L. REV. 378, 381 (1965) (footnotes omitted):

With the development of miniaturized circuits, the methods of eavesdropping have become incredibly subtle. It is now possible to overhear conversation held within a closed room by using a device which makes use of the vibrations in a window pane as it responds to sounds from within. Tubular and parabolic microphones can intercept conversations held hundreds of yards away. Acoustic engineers predict that systems will soon be operable which utilize ultrasonic or electromagnetic waves to penetrate virtually any structural material and monitor conversation held within. Conversation may be monitored from within a room by such Machiavellian devices as wireless transmitters the size of sugar cubes or transmitters disguised as martini olives which transmit sounds via their toothpick aerials. Even wiretapping has developed new subtleties with the invention of devices which monitor telephone conversations by the inductive effect of electromagnetic waves emanating from the current flowing through telephone lines, thus obviating any need to connect directly into the wire. Electronic visual devices, such as miniature television

When the authorities are the intruders, the consequences are apt to prove more than a mere nuisance.<sup>3</sup> Although the fourth amendment was prompted more by the fear of forceful and arbitrary intrusions on the part of law officers than by the prospect of their spying and eavesdropping,<sup>4</sup> its terms were plainly broad enough, at least until the advent of modern technology, to inhibit both. Since the amendment was held to condemn all trespassory incursions upon private dwellings by the authorities,<sup>5</sup> the home owner could ordinarily protect his secrets from the prying eyes and uninvited ears of police agents by simple precautions—drawing the shades and avoiding loud disclosures at open windows.<sup>6</sup>

That, of course, was before the electronic age. For the lawyer, *Olmstead v. United States*<sup>7</sup> may be said to mark the transition.

Olmstead was an extraordinarily active and prosperous bootlegger, a fact which Treasury agents succeeded in documenting by listening to his phone conversations and those of his codefendants for some five months prior to their indictment under the National Prohibition Act. The taps were attached to telephone wires at points outside the defendants' premises. The Court's majority of five concluded that since there had been no attachment of the persons of the defendants, no physical invasion of their premises, and no physical seizure of tangible objects, there had been no search or seizure in the sense of the fourth amendment and the fruits of the surveillance were admissible.

To Justice Brandeis, in dissent, it was immaterial that there had been no trespass and no seizure of any tangible object.<sup>8</sup> The essence

cameras, have become equally sophisticated; although the problem posed by use of such devices has yet to come before the Court, it must be recognized that they are at least as controversial as the auditory devices giving rise to the present problems. It now appears that the only way to be safe from eavesdropping is to hold all conversations inside a tent-like enclosure, or to line the room with aluminum foil and use special glass panes in all windows.

<sup>3</sup> This observation is not confined to the "criminal." As Professor Louis B. Schwartz has pointed out, "we have all at one time or another committed acts that the law regards as serious offenses." Schwartz, *On Current Proposals to Legalize Wire Tapping*, 103 U. PA. L. REV. 157 (1954).

<sup>4</sup> For a general treatment of the historical background of the fourth amendment, see N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 211 (55 The Johns Hopkins University Studies in Historical and Political Science, 1937).

<sup>5</sup> See Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361 (1921).

<sup>6</sup> It has always been true that he who fails to take ordinary precautions to conceal his actions from would-be observers takes the risk. Thus, in *United States v. Lee*, 274 U.S. 559, 563 (1927), Justice Brandeis stated for the Court that a vessel owner could not complain of the action of Coast Guard officers who beamed the searchlight of their cutter upon the vessel's deck in a search for contraband liquor.

<sup>7</sup> 277 U.S. 438 (1928).

<sup>8</sup> *Id.* 478-79. In his view, the appropriate remedy was suppression of the tainted evidence. The Court had already applied the exclusionary principle to private papers which the United States obtained as the result of an unconstitutional search. *Weeks v. United States*, 232 U.S. 383 (1914). Thirty-five years passed before the fourth

of the amendment was to guard against "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed . . . ." <sup>9</sup> "[T]he right to be let alone," the Justice asserted, is "the most comprehensive of rights and the right most valued by civilized men." <sup>10</sup> The principle of the amendment, he concluded, must be continuously applied to "new conditions and purposes," <sup>11</sup> adding prophetically:

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day 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. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security? <sup>12</sup>

Almost forty years later, in *Katz v. United States*,<sup>13</sup> the Court for the first time gave unqualified endorsement to the precept that the amendment "protects people—and not simply 'areas'" and that its reach "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." <sup>14</sup> In *Katz*, FBI agents attached a listening and recording device to the outside of a public telephone booth which they correctly surmised was used by the defendant to transmit wagering information.<sup>15</sup> The Government's activities, Justice Stewart stated for the Court, violated the privacy upon which Katz "justifiably relied" and

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amendment was held to be enforceable against the states through the due process clause. *Wolf v. Colorado*, 338 U.S. 25 (1949). The exclusionary principle was imposed on the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>9</sup> 277 U.S. at 478.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 473.

<sup>12</sup> *Id.* at 474 (footnotes omitted).

<sup>13</sup> 389 U.S. 347 (1967).

<sup>14</sup> *Id.* at 353. Justice Stewart had earlier written for the Court that electronic monitoring of the visiting room of a jail was permissible because the area was not constitutionally protected. *Lanza v. New York*, 370 U.S. 139, 142-44 (1962) (dictum).

<sup>15</sup> Since the listening device was a microphone attached to the booth rather than a tap on the line, § 605 of the Communications Act, 47 U.S.C. § 605 (1964), prohibiting the interception and divulgence of communications by wire and radio, was not in issue. For a discussion of the Court's interpretation and application of § 605, see J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT*, 206-20 (1966).

"thus constituted a 'search and seizure' within the meaning of the Fourth Amendment,"<sup>16</sup> even though Katz had no proprietary interest in the premises and the "seizure" was confined to sound waves.<sup>17</sup>

## II. ONE STEP FORWARD, ONE STEP BACK?

The *Katz* decision appears, at first glance, a striking victory for those who are hostile to the notion of law enforcement officers secretly monitoring private conversations. But *Katz* is a decision with a backlash which may result in a major increase in the quantum of eavesdropping by government agents.

Justice Stewart's opinion noted that the FBI agents who monitored Katz's calls exercised restraint. They did not initiate the surveillance until they had observed his habits and established probable cause to believe that he was using the booth to transmit gambling information. The surveillance was limited to six occasions and the agents took care not to monitor when other persons were inside the booth. On this basis, the Justice concluded that if the agents had obtained advance approval from a duly authorized magistrate, their "limited search and seizure" would have been constitutionally permissible.<sup>18</sup> He left open the question whether even such authorization should be required in cases "involving the national security."<sup>19</sup>

In the brief passage extending approval to eavesdropping with prior authorization, Justice Stewart relies solely upon *Osborn v. United States*,<sup>20</sup> an opinion he wrote the previous year. Osborn, a Nashville lawyer, was retained to represent Teamster President James R. Hoffa,

<sup>16</sup> 389 U.S. at 353.

<sup>17</sup> Among the eavesdropping cases which intervened between *Olmstead* and *Katz*, *Goldman v. United States*, 316 U.S. 129 (1942), and *Silverman v. United States*, 365 U.S. 505 (1961) are notable. *Goldman*, adhering to *Olmstead*, ruled that the use of an electronic device (a detectaphone placed on the wall of a room adjoining the office under surveillance) could not be condemned where there was no trespass upon the premises of the objecting party. *Silverman* resulted in suppression of conversations overheard by a "spike mike," thus explicitly establishing the proposition that conversations may be the subject of a "search and seizure." The Court found it unnecessary, however, to reexamine *Goldman* since it found that the spike had penetrated the defendant's premises. *Accord*, *Clinton v. Virginia*, 377 U.S. 158 (1964) (per curiam), *rev'd* 204 Va. 275, 130 S.E.2d 437 (1963).

<sup>18</sup> 389 U.S. at 354-56. Whether Justice Stewart meant that approval could be granted only in such circumstances or at least in such circumstances will doubtless be debated in future cases. Text accompanying notes 95-112 *infra*. One may note in passing that FED. R. CRIM. P. 41 made provision for the issuance of warrants only for the purpose of searching out and seizing designated types of property.

<sup>19</sup> 389 U.S. at 358 n.23. Concurring, Justice White states: "We should not require the warrant procedure and the magistrate's judgment 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." *Id.* at 364. Justice Douglas, joined by Justice Brennan, sharply disagreed with this suggestion, contending that the protection of the fourth amendment may not be diminished "because a particular crime seems particularly heinous." *Id.* at 360.

<sup>20</sup> 385 U.S. 323 (1966).

who was awaiting trial on a federal charge in that city. Osborn hired one Robert Vick to make background investigations of persons listed on the panel from which the jury for the Hoffa trial were to be drawn. Unbeknownst to Osborn, Vick had previously agreed to inform federal agents of any "illegal activities" he might discover. In due course Vick reported that Osborn had requested him to "fix" a prospective juror, a cousin of Vick's. The government authorities promptly took a written statement from Vick and showed it to the two judges of the federal district court. With the judges' approval, the FBI arranged to conceal a device on Vick's person so that he might make a record of further conversations with Osborn. At issue in Osborn's subsequent trial for attempted bribery was the admissibility of incriminatory statements recorded by the device secreted on Vick. Upholding the use of the evidence, the Supreme Court stressed two factors: that the recording was made for "the narrow and particularized purpose" of determining the truth of Vick's allegations, and that the Government had followed "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment." <sup>21</sup>

There is, however, a significant factual difference in the situations presented by *Katz* and *Osborn*. *Katz*, the Court said, "justifiably relied" upon the assumption that the only person listening was at the other end of the line. Osborn, on the other hand, knowingly addressed his proposal to Vick, taking the risk that the latter might inform. Thus, *Osborn* was similar to *Lopez v. United States*,<sup>22</sup> an earlier bribery case in which an Internal Revenue agent concealed a recorder in order to confirm a taxpayer's prior attempt to corrupt him. In *Lopez*, the Court upheld admission of the recording on the reasoning that since the agent was fully entitled—indeed, duty bound—to disclose the conversation, there was no valid objection to the use of evidence which reproduced the conversation more reliably than the agent's memory. One may argue, as did the three dissenters in *Lopez*,<sup>23</sup> that the prospect of having the other party to a conversation record the event is itself a serious inhibition upon communication. But even granting that, the situation is still different from one in which, unknown to the participants in a con-

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<sup>21</sup> *Id.* at 330.

<sup>22</sup> 373 U.S. 427 (1963). See *On Lee v. United States*, 343 U.S. 747 (1952).

<sup>23</sup> Justice Brennan's dissent was joined by Justices Douglas and Goldberg. 373 U.S. at 446. Chief Justice Warren supported the majority on limited grounds, stating that he would permit "the use of electronic devices to corroborate an agent under the particular facts of this case." *Id.* at 445. He noted that Internal Revenue agents are required by their duties to examine the returns of suspected tax evaders and concluded that they should be able to defend their reputations against the possibility that one who has offered a bribe will strike back by suggesting that it was solicited. *Id.* at 442.

versation, an outside intruder monitors the exchange.<sup>24</sup> Nonetheless, the *Osborn* Court ignored this distinction and relied on the new ground of antecedent justification to a magistrate.<sup>25</sup> The *Katz* decision proved that this choice was no passing aberration.

In the single year between *Osborn* and *Katz*, there were two other notable decisions. One of these was *Berger v. New York*,<sup>26</sup> in which five Justices concluded that New York's eavesdrop statute<sup>27</sup> was unconstitutional on its face.<sup>28</sup> The statute permitted a judge to issue a warrant authorizing electronic surveillance upon the oath of the attorney general, a district attorney, or a police officer above the rank of sergeant "that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof . . . ." <sup>29</sup> The authorization could be for periods up to sixty days and might be renewed on application. Observing that the law did not in terms require mention of the particular crime under investigation, the place to be searched, or the "things" to be seized, Justice Clark's opinion concludes that it cannot be squared with the fourth amendment.<sup>30</sup> The inherent obtrusiveness of eavesdropping, he states, makes the need for particularity "especially great."<sup>31</sup> *Osborn* is contrasted and explained as a case in which the listening device was used in a single instance, "under the most precise and discriminate circumstances," to achieve a specific and important objective—"the effective administration of justice in a federal court."<sup>32</sup> The tenor of his opinion is discouraging to advocates of

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<sup>24</sup> Although an informer intrudes upon privacy, an individual may guard against such intrusion by choosing his confidants with care. However, silence is the only effective means of protecting oneself against the intrusion made possible by available techniques of electronic surveillance. On this ground alone, society might well conclude that electronic surveillance is incompatible with personal liberty and should be regarded as unreasonable per se.

<sup>25</sup> The courts of appeals are now in disagreement on the question whether recordings of the kind sustained in *Lopez* are permissible in light of the *Katz* decision. Compare *United States v. White*, 405 F.2d 838 (7th Cir.), cert. granted, 394 U.S. 957 (1969) (No. 1024, 1968 Term; renumbered No. 46, 1969 Term), with *Koran v. United States*, 408 F.2d 1321 (5th Cir.) petition for cert. filed, 38 U.S.L.W. 3044 (U.S. May 23, 1969) (No. 143).

<sup>26</sup> 388 U.S. 41 (1967).

<sup>27</sup> Ch. 681, § 86, [1967] N.Y. Laws 1623 (repealed 1968).

<sup>28</sup> Justices Black, Harlan, and White, in separate dissents, were of the opinion that the statute should not be judged on its face but as construed and applied by the New York courts. On this basis, they were satisfied that the requirements of probable cause and particularity were met. 388 U.S. at 70, 89, 107. Justice Stewart, who concurred in the result reached by the Court, agreed with the dissenters' approach to the statute but thought that the affidavits submitted to the judge in order to establish probable cause were insufficient. *Id.* at 68.

<sup>29</sup> *Id.* at 43 n.1 citing Ch. 681, § 86, [1967] N.Y. Laws 1623 (repealed 1968).

<sup>30</sup> *Id.* at 58-60.

<sup>31</sup> *Id.* at 56.

<sup>32</sup> *Id.* at 63.

legalized electronic surveillance: "It is said that neither a warrant nor a statute authorizing eavesdropping can be drawn so as to meet the Fourth Amendment's requirements. If that be true then the 'fruits' of eavesdropping devices are barred under the Amendment."<sup>33</sup> However, the *Katz* dictum,<sup>34</sup> soon to follow, was an invitation to devise discriminating mechanisms for just that task.

Almost contemporaneously with *Berger*, the Court decided *Warden v. Hayden*.<sup>35</sup> Although the case involved the seizure of tangible items incident to an arrest, its latent implications were broader. In *Gouled v. United States*,<sup>36</sup> the Court had ruled that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making a search to secure evidence to be used against him in a criminal or penal proceeding . . . ." <sup>37</sup> This was the so-called "mere evidence" rule: one might search for contraband, or the fruits or instrumentalities of crime, but not for mere evidence of crime. Hayden's case prompted reexamination of that precept.

In *Hayden*, the police quickly traced an armed and fleeing robber to a house, entered it, and placed the suspect under arrest. The specific question was whether they were entitled to seize, in addition to weapons and ammunition, items of clothing which served to identify him as the culprit. The Court concluded that the language of the fourth amendment did not support a distinction between a search for a purely evidentiary object and a search for contraband or the like.<sup>38</sup> It also emphasized that the items of clothing were not "testimonial" or "communicative" and that the fifth amendment was therefore not implicated.<sup>39</sup> The Court proceeded to explain that historically the sovereign's right of search and seizure depended upon the assertion of a superior interest in the property at stake. Fruits of crime were rightfully the property of the victim and could be reclaimed by public officers. Instrumentalities

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<sup>33</sup> *Id.*

<sup>34</sup> The Court did not merely hold that, in the absence of a warrant, an electronic search could not meet constitutional standards. It indicated that, subject to certain limitations and conditions, warrants for electronic eavesdropping might be issued. The term "dictum" refers to this aspect of the opinion.

<sup>35</sup> 387 U.S. 294 (1967).

<sup>36</sup> 255 U.S. 298 (1921).

<sup>37</sup> *Id.* at 309. The defendant in *Gouled* was suspected of a conspiracy to defraud the Government. The Government's agent, pretending to make a friendly call, obtained access to his office and stealthily removed several documents, one of which was later introduced at Gouled's trial. One of the questions certified to the Supreme Court was whether papers having evidentiary value were subject to seizure under a search warrant. Disclaiming reliance on the fact that papers, rather than other tangible objects, were involved, the Court stated that a search warrant may be used "only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful . . . ." *Id.*

<sup>38</sup> 387 U.S. at 300-02.

<sup>39</sup> *Id.* at 302-03.

by which a felony had been committed were forfeited to the crown as deodand. Contraband, of course, was likewise forfeited.<sup>40</sup> But this approach, the *Hayden* Court stated, was an anachronism. The principal object of the fourth amendment was protection of privacy rather than property. Search of the house and seizure of the robber's cap and jacket involved no greater invasion of his privacy than a search and seizure in quest of his gun and his loot.

The declaration in *Hayden*—that protection of privacy rather than property is central to the fourth amendment—is consistent with the conclusion, shortly to be reached in *Katz*, that the individual's reasonable expectations of privacy are protected even though the intrusion involves no trespass upon his property. Furthermore, *Hayden's* rejection of the "mere evidence" rule was essential to the *Katz* dictum. It was proof rather than contraband that the agents sought when they monitored Mr. Katz's best bets of the day. The combined effect of the two decisions, *Hayden* and *Katz*, opened the way for Congress's eager response.

### III. CONGRESS COMES TO THE DANCE

The Court, then, concluded (1) that oral communications, no less than tangible objects, are susceptible to "search and seizure" in the sense of the fourth amendment; (2) that the Constitution protects the individual's freedom of oral communication from intrusion by unseen law enforcement officers engaged in electronic surveillance, at least in those situations where the individual has a reasonable expectation of privacy; and (3) that the protection of this privacy does not in any way depend upon whether the intrusion would also constitute a physical trespass. Yet the Court has also suggested in the same breath that there are situations in which, given the advance approval of a magistrate, one's reasonable expectation of privacy may be defeated by the use of an unseen electronic device. This Article challenges the assumptions and the reasoning upon which this suggestion apparently rests.

Preliminarily, however, it will be useful to summarize salient features of the legislation adopted by Congress in 1968 to implement (or expand upon) the Court's suggestion and to provide, for state and nation alike, the official rules by which the games of police wiretapping and bugging are to be conducted.<sup>41</sup> This is not to say that what

<sup>40</sup> *Id.* at 303-04. These ideas are expressed in the famous English case of *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765). It appears that searches and seizures in eighteenth century England were conducted principally for the purpose of gaining custody of forfeitable property and that there was no provision in early English law for the return of property seized under a warrant. *Id.* at 1066.

<sup>41</sup> Omnibus Crime Control and Safe Streets Act of 1968, tit. III, 18 U.S.C. §§ 2510-20 (Supp. IV, 1965-68).



Congress has now purported to authorize is fully consistent with the Court's opinion. As one recent and thoughtful article points out, there are numerous particulars in which the Court might ultimately find that the warmth of the legislative reception exceeds the bounds of the judicial invitation.<sup>42</sup> An examination of the congressional guide to eavesdropping does, however, serve to make more visible and concrete the implications and dimensions of a system of authorized surveillance. It is also the system under which we shall be living unless and until it is modified or rescinded.

Under the new statute, wire interception and interception of oral communications (bugging) may be authorized, subject to specified limitations, in order to investigate a wide variety of offenses.<sup>43</sup> Among the federal offenses are murder, kidnapping, robbery, extortion, embezzlement, theft, interstate transportation of stolen property, bribery, transmission of wagering information, obstruction of justice or of criminal investigations, racketeering and labor offenses, bankruptcy fraud, and violations of the narcotics laws, as well as any conspiracy to commit any of the named offenses.<sup>44</sup> Additionally, the enabling legislation extends to a wide variety of specifically listed state offenses and to other state crimes "dangerous to life, limb, or property, and punishable by imprisonment for more than one year . . . ." <sup>45</sup> Conspiracies to commit any of the designated crimes are also included.<sup>46</sup>

The authorization procedure is initiated in much the same way as an application for an ordinary search warrant. It begins by an *ex parte* proceeding in which the prosecutor <sup>47</sup> presents supporting statements

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<sup>42</sup> H. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455 (1969). Professor Schwartz argues, *inter alia*, that there is very strong doubt about the need for eavesdropping and that in all events Congress might better have left the fashioning of the rules to the Court. *Id.* 498-510.

<sup>43</sup> "Intercept" is defined as an "aural acquisition of the contents of any wire or oral communications through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4) (Supp. IV, 1965-68). "Device" does not include equipment provided by "a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business . . . ." *Id.* § 2510(5)(a)(i). Listening in on an extension telephone would apparently require no authorization. *Cf. Rathbun v. United States*, 355 U.S. 107 (1957). Nor does the Act treat as unlawful an interception accomplished with the consent of one of the parties to the communication. 18 U.S.C. §§ 2511(2)(c), (d) (Supp. IV, 1965-68). *Cf. Lopez v. United States*, 373 U.S. 427 (1963).

<sup>44</sup> 18 U.S.C. § 2516(1) (Supp. IV, 1965-68).

<sup>45</sup> *Id.* § 2516 (2).

<sup>46</sup> *Id.* One may well question the extent of Congress's power to establish limits and standards for local bugging in investigation of local crimes. The point is not pursued in this Article since its focus is upon the limitations which the Constitution may impose upon the use of electronic surveillance.

<sup>47</sup> In the case of the federal government, the application must be authorized by either the attorney general or an assistant attorney general; in the case of a state or local government, by the principal prosecuting attorney of the state or political subdivision. *Id.* §§ 2516(1), (2).

or affidavits to a "judge of competent jurisdiction."<sup>48</sup> In substance, the prosecutor must offer evidence constituting probable cause to believe that an offense to which the statute applies "has been, is being, or is about to be committed . . . ." <sup>49</sup> He is further required to set forth the place of the proposed interception, the type of communications sought to be intercepted, and the identity, if known, of the suspected offender.<sup>50</sup> He must also state what other means of investigation have been attempted and why other means are not feasible.<sup>51</sup> If the judge finds the showing sufficient,<sup>52</sup> he may authorize interception for a period not to exceed thirty days.<sup>53</sup> Extensions for a like period may be granted on further application.<sup>54</sup>

There is, however, a noteworthy exception to the requirement for advance judicial approval of an interception. This is the so-called "national security" provision, which reads as follows:

(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measure as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.<sup>55</sup>

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* § 2518(1) (b).

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

<sup>51</sup> *Id.* § 2518(1) (c).

<sup>52</sup> *Id.* § 2518(3).

<sup>53</sup> *Id.* § 2518(5).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 2511(3). Another significant exception to the requirement of advance judicial authorization appears in § 2518(7). Pursuant to that section, designated law enforcement officers, when confronted with an "emergency situation . . . with respect to conspiratorial activities threatening the national security interest . . . or characteristic of organized crime . . . .," may intercept upon their own determination that there is no time to secure an order and that valid grounds for its issuance do exist. In these circumstances, the interceptor is directed to apply for an order "within forty-eight hours after the interception has occurred, or begins to occur." If an order is denied, any information secured is treated as obtained in violation of the Act.

Evidence obtained by an authorized interception may be used in any criminal proceeding, federal or state.<sup>56</sup> Even if the evidence goes to an offense far removed from that which provided the basis of the order to intercept, it may be utilized upon a finding that the interception was conducted in conformity with the Act.<sup>57</sup> Information or evidence obtained in the course of an authorized interception may be circulated to other investigative or law enforcement officers to the extent that the disclosure is "appropriate to the proper performance of the official duties of the officer making or receiving the disclosure."<sup>58</sup>

#### IV. SEIZURES OF TANGIBLE OBJECTS AND OF INCRIMINATORY STATEMENTS: A DISTINCTION WITH A CONSTITUTIONAL DIFFERENCE

##### A. *The Unreasonable Search*

Justice Stewart's *Katz* opinion has a deceptive simplicity: (1) The fourth amendment protects the individual's reasonable expectations of privacy<sup>59</sup> against arbitrary intrusion by governmental authorities. (2) Therefore, the amendment does not merely guard against arbitrary intrusions by the police when they are engaged in a search for tangible "things"; it also protects oral communications, and it does so irrespective of whether the intrusion is a technical trespass.<sup>60</sup> (3) Since, however, the clause of the fourth amendment setting forth minimal requirements for procurement of a search warrant contemplates that "things" may be seized upon a proper antecedent showing to a magistrate, it is also permissible to seek evidence by surveillance of oral communications

<sup>56</sup> *Id.* § 2517(3).

<sup>57</sup> *Id.* § 2517(5).

<sup>58</sup> *Id.* § 2517(1). Unless the judge finds good cause for postponement, a person who has been the target of surveillance is given notice of that fact within 90 days of its termination. *Id.* § 2518(8)(d). Persons whose communications were intercepted during the surveillance, but who were not named in the order, are given notice only if the judge in his discretion concludes that the interests of justice would be served thereby. *Id.* Use of intercepted material at a trial requires that the affected party be served in advance with copies of the order and application pertaining to the interception. *Id.* § 2518(9). Pretrial disclosure of the contents of an intercepted communication is discretionary with the judge. *Id.* § 2518(8)(d).

<sup>59</sup> While the word "privacy" does not appear in the Constitution, the Court has often declared in one form or another since its first authoritative exposition of the fourth amendment in *Boyd v. United States*, 116 U.S. 616, 630 (1886), that the amendment protects both "the sanctity of a man's home and the privacies of life." *See, e.g.,* *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Lopez v. United States*, 373 U.S. 427, 462 (1963) (dissenting opinion); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961); *cf. Griswold v. Connecticut*, 381 U.S. 479, 485-86 (concurring opinion) (1965) (involving the conflict between marital privacy and a state's ban of the use of contraceptives). *See generally* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); Beaney, *The Constitutional Right to Privacy in the Supreme Court*, in 1962 SUPREME COURT REVIEW 212 (P. Kurland ed. 1962).

<sup>60</sup> This ruling, as indicated earlier, was foreshadowed by *Silverman v. United States*, 365 U.S. 505 (1961).

if a magistrate gives his prior approval pursuant to appropriate standards and limitations.

One's immediate reaction to the third proposition is wonder that, after so long, Anglo-American jurisprudence has conjured up the idea of official eavesdropping by the magistrate's leave. After all, in its more primitive forms eavesdropping is an ancient art—known to the eighteenth century lawyer as a “common nuisance” and an indictable offense.<sup>61</sup> Yet, so far as this author is aware, no judge has ever considered it within his province to issue the constable a warrant to lurk under a householder's eaves or to hide in his attic or broom closet to listen for incriminatory conversation. What has technology wrought? Has it somehow become more congenial in our “civilized” society—and more constitutionally tolerable—to admit an electronic intruder which can pick up every whisper in living room, bedroom, or bath and broadcast or record it for the benefit of the police?<sup>62</sup>

The power probably was not asserted earlier because there are obvious differences—both in manner of intrusion and in degree of obtrusiveness—between an open search for a particular thing in being, relating to an offense already committed, and a protracted secret search for an incriminatory act or admission which may occur at some future time. A procedure of antecedent justification to a magistrate, which Justice Stewart regards as “central to the Fourth Amendment,”<sup>63</sup> cannot eliminate the effects upon privacy implicit in this distinction.

What is truly central to the fourth amendment, as Justice Bradley stated in his historic opinion in *Boyd v. United States*, is “the sanctity of a man's home and the privacies of life.”<sup>64</sup> To be sure, the warrant clause of the fourth amendment shows that there is no absolute right to privacy and no absolute right to exclude the police from one's home. Putting aside, however, the very serious question whether electronic surveillance can ever satisfy the specific requirements and conditions of the warrant clause,<sup>65</sup> it should be emphasized that the warrant clause is far from the whole of the amendment:

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.

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<sup>61</sup> 4 W. BLACKSTONE, *supra* note 1, at \* 168.

<sup>62</sup> For reference to recent state statutes authorizing electronic interception under court order, see *Berger v. New York*, 388 U.S. 41, 47-49 (1967).

<sup>63</sup> *Katz v. United States*, 389 U.S. 347, 359 (1967) (quoting from Justice Stewart's earlier opinion in *Osborn v. United States*, 385 U.S. 323, 330 (1966)).

<sup>64</sup> *Boyd v. United States*, 116 U.S. 616 (1886).

<sup>65</sup> Text accompanying notes 95-112 *infra*.

On the face of it, the first clause recognizes a comprehensive and preexisting right to be secure against unreasonable searches and seizures.<sup>66</sup> The second clause establishes minimal conditions for the issuance of a warrant—a reflection of the historic fact that one of the most notorious means by which privacy was violated, both in England and in the colonies, was through warrants authorizing broad or general searches for matter deemed to be contraband. Some of the great English cases of the eighteenth century—cases well known to the Framers—turned on issuance of a general warrant to search a man's papers for seditious utterances.<sup>67</sup> It is also well known that the passions of the colonists were aroused by the overly broad writs of assistance used to enforce the customs law.<sup>68</sup> A natural reading of the amendment is that a search may be unreasonable even when made pursuant to a proper warrant. The Framers' antipathy to the general warrant—which in light of their recent experience was so strong they wished to make it the subject of a discrete prohibition—does not detract from their express determination to prohibit all unreasonable intrusions.

This view is supported by the evolution which took place in drafting the amendment. The first draft by the Committee of Eleven stated:

The right of the people to be secure in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched and the persons or things to be seized.<sup>69</sup>

Lasson summarizes the ensuing history as follows:

As reported by the Committee of Eleven and corrected by Gerry, the Amendment was a one-barrelled affair, directed apparently only to the essentials of a valid warrant. The general principle of freedom from unreasonable search and seizure seems to have been stated only by way of premise, and the positive inhibition upon action by the Federal Government limited consequently to the issuance of warrants without probable cause, etc. That Benson interpreted it in this light is

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<sup>66</sup> The first clause "is general and forbids every search that is unreasonable." *Go-Bart Co. v. United States*, 282 U.S. 344, 357 (1931).

<sup>67</sup> Of these, the best known and most influential upon the course of American constitutional decision was Lord Camden's celebrated opinion in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765). See also *Wilkes v. Wood*, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (K.B. 1763). See generally N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 22-50 (55 *The Johns Hopkins University Studies in Historical and Political Science*, 1937); J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19-30 (1966); F. SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND*, 1476-776 (1952).

<sup>68</sup> The resistance to writs of assistance by men like James Otis of Massachusetts is a familiar story. For a detailed account, see N. LASSON, *supra* note 67, at 51-78.

<sup>69</sup> 1 ANNALS OF CONG. 754 (1789) [1789-1791].

shown by his argument that although the clause was good as far as it went, *it was not sufficient*, and by the change which he advocated to obviate this objection. The provision as he proposed it contained *two* clauses. The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope. That the prohibition against "unreasonable searches" was intended, accordingly, to cover something other than the form of the warrant is a question no longer left to implication to be derived from the phraseology of the Amendment.<sup>70</sup>

The Court has given independent significance to the first clause in holding that in some circumstances a warrantless search may be reasonable.<sup>71</sup> It is surely no less in keeping with the history and underlying purposes of the fourth amendment to conclude that certain types of searches are inherently unreasonable.

That, of course, is the teaching of *Boyd v. United States*,<sup>72</sup> a case upon which the Court has relied heavily over the years,<sup>73</sup> and which Justice Brandeis characterized as one "that will be remembered as long as civil liberty lives in the United States."<sup>74</sup> A subpoena duces tecum was served upon the Boyds, two New York City merchants, as owners of certain goods against which a forfeiture proceeding had been initiated.<sup>75</sup> The Boyds were charged with violation of the customs laws. The subpoena, issued under the authority of an act of Congress, ordered the production of papers relating to importation of the goods. The sanction for noncompliance was that facts alleged in the Government's motion to produce would be regarded as confessed. The Court held that "compulsory production of a man's private papers to establish a

<sup>70</sup> N. LASSON, *supra* note 67, at 103 (emphasis in original) (footnotes omitted).

<sup>71</sup> Thus, the Court has approved searches without a warrant incidental to a lawful arrest. It stated in *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), that this did not depend upon the "practicability of procuring" a warrant, as held earlier in *Trupiano v. United States*, 334 U.S. 699 (1948), but "upon the reasonableness of the search after a lawful arrest. . . ." Recently, in *Chimel v. California*, 395 U.S. 752 (1969), the Court held that a warrantless search incident to a lawful arrest, made in the arrestee's home, is a reasonable police measure only if it is confined to the person of the arrestee and to the area wherein he "might have obtained either a weapon or something that could have been used as evidence against him." *Id.* at 768. *Rabinowitz* had permitted a broader incidental search: a search for seizeable items reasonably believed to be located on the premises.

In another series of cases beginning with *Carroll v. United States*, 267 U.S. 132 (1925), the Court has upheld the reasonableness of a warrantless search of a moving vehicle. See also cases cited in *Katz v. United States*, 389 U.S. 347, 357-58 nn.19 & 20 (1967). For a critique of the cases in these categories, see Landynski, *supra* note 15, at 87-117.

<sup>72</sup> 116 U.S. 616 (1886).

<sup>73</sup> In *Carroll v. United States*, 267 U.S. 132, 147 (1925), *Boyd* was described as "the leading case on the subject of search and seizure."

<sup>74</sup> *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion).

<sup>75</sup> The Court treated the forfeiture proceeding as criminal in substance although civil in form. 116 U.S. at 634.

criminal charge against him, or to forfeit his property," was indistinguishable from a search and seizure and was therefore "within the scope of the Fourth Amendment";<sup>76</sup> that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [*Entick v. Carrington*]";<sup>77</sup> and that "seizure of a man's private books and papers to be used in evidence against him is [not] substantially different from compelling him to be a witness against himself."<sup>78</sup> Thus, although the facts would have permitted the Court to rely solely upon the fifth amendment,<sup>79</sup> it nevertheless found specifically that there was also an unreasonable search and seizure.<sup>80</sup> The Court was at pains to make clear throughout its opinion that the authorities could not acquire personal papers for prosecutorial purposes whether they proceeded by physical search under a warrant or by any other form of legal process.<sup>81</sup>

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<sup>76</sup>*Id.* at 622. Whether papers of the particular kind involved in *Boyd* should be regarded as personal papers, rather than business records, is immaterial for present purposes.

<sup>77</sup>*Id.* at 630. Although there is language in *Boyd* to the effect that lawful searches are confined to contraband and the fruits or instrumentalities of crime (see the discussion of the *Gouled* case, note 37 *supra* & accompanying text), the critical fact for Justice Bradley was probably the attempt to reach what he regarded as private papers. The offensiveness of a "paper-search" was also emphasized in *Entick v. Carrington*, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (K.B. 1765), to which Justice Bradley made elaborate reference. In *Entick*, Lord Camden observed:

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.

*Id.* at 1066, 95 Eng. Rep. at 817-18 (Eng. Rep. greatly abbreviated).

<sup>78</sup>116 U.S. at 633.

<sup>79</sup>If the Boyds had been obliged to respond to the subpoena, they would have been required both to produce and authenticate the evidence to be used against them. *Curcio v. United States*, 354 U.S. 118, 125 (1957); *United States v. Austin-Bagley Corp.*, 31 F.2d 229, 233-34 (1929) (L. Hand, J.).

<sup>80</sup>In light of this finding, *Boyd* cannot be regarded as strictly a fifth amendment case. The Court does discuss the interdependence of the two amendments, 116 U.S. at 633, which might lead one to conclude that the search and seizure was unreasonable only because it resulted in compulsion of self-incriminating testimony. Since the fifth amendment does not protect against self-incrimination which is not compelled, *Hoffa v. United States*, 385 U.S. 293, 303-04 (1966), this would preclude application of *Boyd* to electronic eavesdropping cases. However, the lengthy discussion of the fourth amendment, *Entick*, and other search and seizure cases makes it plain that the Court considered there were two separate grounds for the decision, one of which was the prohibition of the first clause of the fourth amendment.

<sup>81</sup>In a similar vein, Justice Field stated:

Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others.

*In re Pacific Ry. Comm'n*, 32 F. 241, 250 (C.C.N.D. Cal. 1887).

*Boyd* certainly dictates the conclusion that a proper concern for the "privacies of life" precludes the search of a man's home or office to examine his personal correspondence. Thus, it is inordinately difficult to see how the Court can endorse surveillance of oral communications in which persons engage with a reasonable expectation of privacy, unless it is prepared to repudiate *Boyd*. Yet Justice Stewart fails even to mention that decision in *Katz*.

In his *Olmstead* dissent, Justice Brandeis correctly observed that a wiretap is far more intrusive than the searches for contraband conducted in the colonies pursuant to writs of assistance.<sup>82</sup> To Justice Brandeis's point (which remains intact) one might well add that bugs, parabolic mikes, and other contemporary devices which now bear the congressional seal of approval are in turn considerably more intrusive than the wiretap. Awareness of party lines, switchboards, and telephone extensions may already tend to make people somewhat guarded in their telephone conversations, quite apart from any thought of a tap. If, however, one cannot even be assured of privacy in direct conversations in one's parlor or bedroom, in one's office, club, or automobile, or on a lonely park bench, little would seem to be left to the man in whom governmental authorities have developed an interest.

The recent decision in *Stanley v. Georgia*<sup>83</sup> also draws upon the principle that there is a zone of privacy into which the state cannot intrude. The Court<sup>84</sup> held that "the mere *private* possession of obscene matter cannot constitutionally be made a crime."<sup>85</sup> It assumed that the material on which the prosecution was based—films discovered in the course of a search pursuant to a warrant authorizing the seizure of bookmaking apparatus—was obscene,<sup>86</sup> and indicated that its public display or distribution might be forbidden.<sup>87</sup> However, it went on to say that "a State has no business telling a man, sitting alone in his own

<sup>82</sup> 277 U.S. at 474. Justice Brandeis also commented:

Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and although proper, confidential and privileged, may be overheard.

*Id.* at 475-76. As noted earlier, the premises upon which the *Olmstead* majority concluded that the wiretapping in that case was beyond the reach of the fourth amendment have been rejected. Text accompanying notes 13-17 *supra*.

<sup>83</sup> 394 U.S. 557 (1969).

<sup>84</sup> The result was unanimous, but only 5 Justices joined in the opinion of the Court. Three of the 4 concurring Justices (Justices Stewart, Brennan, and White) expressed the view that taking the films and projecting them on a screen to examine the contents was an abuse of the limited authority contained in the warrant and hence a violation of the fourth amendment's requirement of particularity. *Id.* at 569-72.

<sup>85</sup> *Id.* at 559 (emphasis added).

<sup>86</sup> *Id.* at 559 n.2.

<sup>87</sup> *Id.* at 567-68.



house, what books he may read or what films he may watch.”<sup>88</sup> For not only does the first amendment uphold “the right to read or observe what [one] pleases”;<sup>89</sup> one also has a “right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”<sup>90</sup> One would surely suppose that the right to communicate with one’s intimates and associates, in one’s own home, free from unwanted governmental intrusion, is no less worthy of protection than the right to view dirty pictures in the living room.

The view that there is a zone of privacy which is protected from intrusion, with or without a search warrant, is likewise expressed in Justice Douglas’s opinion for the Court in *Griswold v. Connecticut*, where he asks the rhetorical question: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?”<sup>91</sup>

*Warden v. Hayden*<sup>92</sup> is also consistent with the zone of privacy theory. In rejecting the mere evidence rule, the Court carefully preserved the distinction between tangible and communicative objects:

The items of clothing involved in this case are not “testimonial” or “communicative” in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.<sup>93</sup>

To be sure, the scope that is accorded to a “right of privacy”—or, to state it in fourth amendment terms, the determination when a governmental intrusion violates “the right of the people to be secure . . . against unreasonable searches and seizures”—ultimately involves an appraisal of values for which there are no given weights or measures. Even so, can one fairly characterize the idea of law enforcement officers secretly and pervasively monitoring the homes, offices, and meeting places of the citizenry in search of proof of crime as anything less than deeply offensive to the values of a decent society? Speaking some years ago of a much lesser electronic intrusion than those recently approved by Congress, Judge Jerome Frank stated:

A man can still control a small part of his environment.  
 . . . [H]e can retreat thence from outsiders, secure in the

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<sup>88</sup> *Id.* at 565.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 564.

<sup>91</sup> 381 U.S. 479, 485 (1965).

<sup>92</sup> 387 U.S. 294 (1967).

<sup>93</sup> *Id.* at 302-03.

knowledge that they cannot get at him without disobeying the Constitution. That is still a sizeable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.<sup>94</sup>

The time has come when, if we give reign to the advancing science of electronics, there will be no hiding place down here.

### B. *The Warrant Clause*

If, as urged above, electronic surveillance by the authorities is to be condemned as a breach of privacy incompatible with the fundamental values protected by the fourth amendment, it is unnecessary to consider the specifics of the warrant clause. That is to say, if oral communications in which persons engage with a reasonable expectancy of privacy are immune from governmental intrusion, it is superfluous to ask what procedures would be constitutionally required if they were violable.

On the other hand, one can reverse the questions and ask, at the outset, whether it is possible to reconcile the practice of electronic surveillance with the requirements of the warrant clause. If not, there is no constitutional means of obtaining the antecedent judicial approval upon which the *Katz* dictum and title III of the 1968 Act depend.<sup>95</sup> This approach would be in keeping with the judicial preference for narrow and specific, rather than broad, grounds of adjudication.

There is, however, some awkwardness in deciding the constitutionality of electronic surveillance solely by reference to the formal requirements for issuance of a warrant. Those requirements were drawn when the only known method of conducting a search was by dispatching a person to perform the job, and the only contemplated object of a search was tangible. Application of the language of the warrant clause to wholly unanticipated conditions is not simply a matter of resort to the dictionary and the tools of logic. As with the first clause of the amendment, the process of interpretation calls for an appraisal of underlying

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<sup>94</sup> United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (dissenting opinion), *aff'd*, 343 U.S. 747 (1952). In *On Lee*, the overheard conversation was between the defendant and an undercover agent carrying a concealed microphone in his overcoat pocket. The microphone transmitted the words to another agent standing outside the shop within which the conversation occurred. *Accord*, Lopez v. United States, 373 U.S. 427 (1963), discussed at text accompanying notes 22-23 *supra*. The 1968 legislation would require no authorization when a conversation is monitored with the consent of one of the participants. 18 U.S.C. § 2511(2)(c) (Supp. IV, 1965-68).

<sup>95</sup> One qualification is in order. The *Katz* dictum left open the question whether a warrant would be required in the case of offenses relating to national security. 389 U.S. at 358 n.23. Congress has fashioned statutory exceptions to the warrant procedure in cases involving national emergency. 18 U.S.C. §§ 2511(3), 2518(7) (Supp. IV, 1965-68). The question of national security is discussed at text accompanying notes 113-51 *infra*.

purposes. Thus, whether one begins with the first or second clause, the relevant considerations tend to converge. However, by looking at both one may gain added perspective.

The first requirement of the warrant clause is a showing of probable cause. There is no apparent reason why an officer proposing to engage in electronic surveillance could not establish, in much the same way as one seeking leave to conduct an orthodox search, grounds for believing that the target of the investigation has committed, or is engaged in committing, a particular offense. It is worth noting, however, that one of the principal "practical" justifications regularly advanced by advocates of electronic eavesdropping is that it provides the police unrivaled opportunity to keep an eye on the manifold activities of organized criminals (or those suspected to be) and to gain "strategic intelligence" concerning their "organizational structure and operational methods."<sup>96</sup> Since surveillance for the avowed purpose of conducting a general watch would never pass muster, the pursuit of strategic intelligence, under a system such as that devised by Congress, also requires a bit of tactical make-believe: one must designate an ostensible objective (evidence relating to a particular offense) in order to obtain an unadvertised by-product (the wealth of information yielded by a protracted electronic surveillance).<sup>97</sup>

This of course points up the critical question posed by the warrant clause: can one reconcile the inherent character of an electronic surveillance with the condition that the warrant describe with particularity "the things to be seized"?

That electronic eavesdropping is indiscriminate is indisputable. A bug, wherever planted, picks up the utterances of all who come within its range, whether or not the communication bears any relation to the description of subject matter contained in the warrant. The bug knows no principle of relevancy, has no objection to hearsay or gossip, and is quite unacquainted with common law doctrines of privilege. It is, in a word, omnivorous.

The requirement of particularity, on the other hand, was designed to prevent the random or general foray. In the nonelectronic case,

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<sup>96</sup> The quoted language appears in PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 199 (1967). Pertinent excerpts from that report are reproduced in the appendix to Justice White's dissenting opinion in *Berger v. New York*, 388 U.S. 41, 119, 122-23 (1967). See also H. Schwartz, *supra* note 42, at 468-72.

<sup>97</sup> In *Marron v. United States*, 275 U.S. 192, 196 (1927), quoted with approval by the majority's opinion in *Berger*, 388 U.S. at 58, the Court declared that the amendment prevents "the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." On the other hand, title III contemplates both investigative use of information unrelated to the description in the warrant and introduction of such material in evidence. Text accompanying notes 56-58 *supra*.

specifying the object to be seized limits the extent of intrusion in two ways: it narrows the scope of search,<sup>98</sup> and it confines the taking to the object described.<sup>99</sup> Individual justices have defended electronic surveillance against these criticisms on two grounds: (1) almost all searches, however conducted, are bound to reveal "items which do not relate to the purpose of the search";<sup>100</sup> (2) "[j]ust as some exercise of dominion, beyond mere perception, is necessary for the seizure of tangibles, so some use of the conversation beyond the initial listening process is required for the seizure of the spoken word."<sup>101</sup>

In regard to the first point, there are limitations in the nature and practice of the conventional search that cannot be incorporated in the electronic search. It is undoubtedly true that if the police are engaged in a visual search for a designated object, they are very likely to see numerous other tangible items in their quest for the specified one. However, it is by no means inevitable that they will see or examine every possession of the resident. The officer engaged in the traditional search announces his identity and provides notice of the extent of his authority.<sup>102</sup> The homeowner or office tenant may be able to satisfy the warrant by voluntarily producing or promptly revealing the item in question.<sup>103</sup> In other situations, the character of the described item will itself impose limitations. Police searching for a still or a rifle could hardly justify combing the contents of small drawers. To be sure, if they are searching for heroin they might well have reason to go through a man's books and papers in hopes of finding glassine envelopes containing powdery substances. Even in that case, however, they could claim no authority to examine the books for telltale traces of obscenity or to photostat the papers in the thought that they might produce something incriminatory.<sup>104</sup>

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<sup>98</sup> In Judge Learned Hand's words, "limitations upon the fruit to be gathered tend to limit the quest itself . . ." *United States v. Poller*, 43 F.2d 911, 914 (2d Cir. 1930); *cf. Chimel v. California*, 395 U.S. 752 (1969).

<sup>99</sup> *Marron v. United States*, 275 U.S. 192, 196 (1927); *cf. Kremen v. United States*, 353 U.S. 346 (1957).

<sup>100</sup> *Berger v. New York*, 388 U.S. 41, 108 (1967) (White, J., dissenting).

<sup>101</sup> *Id.* at 98 (Harlan, J., dissenting).

<sup>102</sup> The so-called rule of announcement has a long history. *See Semayne's Case*, 5 Co. Rep. 91, 92, 77 Eng. Rep. 194, 195 (K.B. 1603); *Blakey, The Rule of Announcement & Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499 (1964). Its observance is apparently regarded by the Court as constitutionally required in the absence of exigent circumstances. *Ker v. California*, 374 U.S. 23 (1962). *See also Berger v. New York*, 388 U.S. 41, 60 (1967); *Miller v. United States*, 357 U.S. 301 (1958).

<sup>103</sup> Also, knowing the limits of the officer's authority, he is in a position to protect his interests. *See* the discussion of the right of self-protection in *Frank v. Maryland*, 359 U.S. 360, 365 (1959). Justice Brennan has remarked that the only protection against current techniques of electronic eavesdropping is to refrain from speech. *Lopez v. United States*, 373 U.S. 427, 450 (1963) (dissenting opinion).

<sup>104</sup> *See Stanley v. Georgia*, 394 U.S. 557, 569-72 (1969) (concurring opinion).

The conventional search is limited to a designated thing in being—one of a finite number of things to be found in the place where the search is to be conducted, and ordinarily discoverable in a single brief visit. On the other hand, electronic surveillance is a quest for something which may happen in the future. Its effectiveness normally depends upon a protracted period of lying-in-wait. For however long that may be, the lives and thoughts of many people—not merely the immediate target but all who chance to wander into the web—are exposed to an unknown and indiscriminating intruder. Such a search has no channel and is certain to be far more pervasive and intrusive than a properly conducted search for a specific, tangible object at a defined location.

As Justice Harlan has observed, if listening by itself constituted seizure, "it would be virtually impossible for [the] . . . authorities . . . to describe with particularity the seizures which would later be made during extended eavesdropping . . ." <sup>105</sup> Moreover, there would inevitably be seizures which lacked "sufficient nexus with the offenses for which the order was first issued." <sup>106</sup> As indicated in the quotation above (that states the second defense of electronic surveillance), the Justice avoids this problem by suggesting that, just as seizure of a tangible object occurs only with the exercise of dominion, there is no "seizure" of oral communications until use is made of them. However, there are two serious difficulties with this theory.

First, whatever happens later, violation of a confidential communication is itself a grave detriment. Not only is it an inroad upon the personal liberty of those caught in the net of surveillance; it is also an inhibition upon all members of the society in which the practice gains footing.

Second, there is no means by which the magistrate can adequately police the police in their use of the information dredged up. Quite

<sup>105</sup> *Berger v. New York*, 388 U.S. 41, 97 (1967) (Harlan, J., dissenting).

<sup>106</sup> *Id.* at 97-98. It may be suggested that the situation presented by *Katz v. United States* falls within the exceptional category. In light of Katz's observed habits and the extensive background information known to the investigators, it was possible in that instance "to describe with particularity the seizures which would later be made." But although it may have been fairly predictable that gambling would be discussed, it certainly was not predictable that the conversations would be confined to that subject. Of course, if future decisions limit the *Katz* decision to circumstances in which one can fairly forecast the content of each conversation to be monitored, its significance will be small. It is difficult to believe, however, that Justice Stewart, the author of the *Katz* opinion, intended only that, when he invited law enforcement officers to seek antecedent judicial approval of electronic surveillance. The same Justice earlier expressed the view that New York's eavesdrop statute was "entirely constitutional." *Berger v. New York*, 388 U.S. 41, 68 (1967) (concurring opinion). Moreover, he voted to reverse the conviction in *Berger* on the sole ground that the showing of probable cause was too bare to support an order authorizing a continuing 60-day surveillance of a lawyer's office. *Id.* at 70. In view of the changed composition of the Court (only 2 of the 5 justices who found New York's eavesdrop statute unconstitutional remain on the Court; the 4 justices who were of the contrary opinion are still sitting), it seems unlikely that the *Katz* dictum will be so strictly circumscribed.

apart from incriminatory implications, excavation of private communications may yield nuggets of endless variety—items for the *voyeur*, items of political significance, items of commercial value, items of interest to the press, items for divorce courts, and items for blackmail. Those who conduct the surveillance may file the information in their minds for future reference, enter it in dossiers, or feed it to data banks. They may also transmit it to other official investigators, or “leak” it to the press or to interested private persons.<sup>107</sup>

An agent of the Federal Bureau of Investigation recently acknowledged under oath that the Bureau had conducted an extended surveillance of the late Dr. Martin Luther King.<sup>108</sup> It has also been reported by columnist Carl T. Rowan, former head of the United States Information Agency, that during his period of government service he saw summaries of recorded conversations resulting from a surveillance of Dr. King; that these summaries contained derogatory information concerning the subject’s sex life; and that the Director of the FBI, in pursuit of his own purposes, divulged this information to various persons, including favored journalists and selected members of Congress.<sup>109</sup> In considering this example—involving the agency which enjoys the best reputation for probity among our police organizations—one should bear in mind that if eavesdropping is sanctioned, it will be practiced not only by federal investigators, but also in state and municipality, town and county.<sup>110</sup> It is notoriously easy for prosecutors to

<sup>107</sup> A former assistant district attorney of Kings County, New York, reported many instances in which police officers engaged in wiretapping, both with and without court orders, used the information obtained in order to “shake down” the persons overheard. S. DASH, R. SCHWARTZ & R. KNOWLTON, *THE EAVESDROPPERS* 55-62 (1959). The same authors noted a similar pattern in New Orleans. *Id.* 124-25.

<sup>108</sup> N. Y. Times, June 5, 1969, at 27, col. 1.

<sup>109</sup> Phila. Evening Bulletin, June 16, 1969, at 17, col. 7. See also *THE NATION*, June 23, 1969, at 780-81 & July 7, 1969, at 5; I. F. STONE’S WEEKLY, June 30, 1969, at 4. Responding to Mr. Rowan’s comments, Associate Director Clyde A. Tolson of the FBI confirmed the fact of the surveillance and stated that its conduct was authorized by the late Attorney General Robert F. Kennedy. N. Y. Times, June 19, 1969, at 25, col. 5. He did not deny Mr. Rowan’s statements regarding dissemination.

<sup>110</sup> Another example of an apparently calculated “leak” by federal officers is provided by a complex litigation arising in Nevada. The United States brought a prosecution for income tax evasion against one Edward Levinson, the proprietor of a Las Vegas hotel and casino, on the theory that he had been “skimming” receipts at the casino, failing to record and report income. Discovering that his establishment had been extensively monitored by the FBI, Levinson brought an action for damages in the state courts for breach of privacy, naming the local telephone company (which had collaborated with the Government) and agents of the FBI as defendants. The civil action was highly embarrassing to the United States. Not only was there the threat of a substantial money judgment against FBI agents who had been following instructions of their superiors; the Nevada court also issued orders, at the behest of the civil plaintiffs, which would have permitted extensive discovery of the techniques and practices employed by the Bureau. *Elson v. Bowen*, 83 Nev. 515, 518-19, 436 P.2d 12, 14 (1967). While both the criminal and civil actions were pending, unidentified quotations from private conversations involving Levinson appeared in an issue of *Life* magazine. Smith, *The Mob*, LIFE, Sept. 8, 1967, at 91. The excerpts suggested that Levinson was “skimming” \$100,000 a month from the gaming tables, and were

obtain search warrants.<sup>111</sup> Since the description of subject matter in a warrant, no matter how specific, has no effect upon the scope of an electronic search, our law enforcement officers, armed with the very latest devices and the law's blessing, may soon have ambitions of collective omniscience.

It is true that Justice Harlan's approach, contrary to that adopted in title III, seems to forbid prosecutorial use of incriminatory evidence unrelated to the description in the warrant. Such a rule, however, is more easily laid down than administered. In practice it may be difficult for the persons affected to preclude indirect use. Stimulated and aided by the information, the authorities may contrive to construct an "independent" case. Or a lead may be quietly conveyed to an interested investigator in another branch of government or in another jurisdiction. To follow such a lead to its ultimate destination is like trying to track a rumor to its source.<sup>112</sup>

In short, electronic surveillance is almost inevitably a general search and the consequences of such indiscriminate spying are not only harassing, but inherently unmanageable.

## V. OF SECURITY AND FOREIGN INTELLIGENCE

### A. *The Issue Emerges*

In his *Berger* dissent, Justice Black observed that there were those who would bar electronic eavesdropping "except in searching for evi-

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taken verbatim, according to Levinson's counsel, from the FBI's records of the surveillance. At the time the *Life* story appeared, the material derived from the surveillance was classified. It had been submitted to the Nevada trial court but had not been made available to the public.

The tactical skirmishes between the Government and Mr. Levinson ended in March, 1968, when the United States accepted a nolo contendere plea in the tax case (resulting in the imposition of a fine) and Mr. Levinson simultaneously dismissed his multi-million dollar action for damages. *N. Y. Times*, March 29, 1968, at 22, col. 4.

It may also be noted that other *Life* articles on crime by Sandy Smith have likewise drawn heavily on material derived from official eavesdropping. See *Life*, Sept. 1, 1967, at 15, Sept. 29, 1967, at 34, March 15, 1968, at 66 & May 30, 1969, at 45. In some instances, the source is rather clearly indicated; in others, it is inferable.

<sup>111</sup> Probable cause may be rested in large part on the words of confidential informants, see *Draper v. United States*, 358 U.S. 307 (1959), if more respectable affiants are unavailable. The prosecutor is often able to choose his judge. The proceedings, which are of course ex parte, are often little more than a formality. Comments to this effect by judges, prosecutors, and lawyers are noted in *H. Schwartz, supra* note 42, at 483-84.

<sup>112</sup> For example, in the early 1960's, an Internal Revenue agent named Yung engaged in extensive wiretapping in Miami, Florida, collecting a mass of information which he thought might be useful in the investigation of tax evasion. Many of the intercepted calls were long distance calls to or from persons in other parts of the country. Yung made a practice of telephoning field agents in other areas when he had information pertaining to persons in their locality. However, he kept no records to show what information was passed on or to whom. Since Yung's activities have come to light, protracted proceedings have been conducted in a number of criminal cases in an effort to determine whether the prosecution's evidence was tainted by the

dence in the field of 'national security,' whatever that means."<sup>113</sup> That term, whatever it does mean, has served as an umbrella for a wide variety of official enterprises ranging from investigations of employee loyalty, dissident organizations, and organized crime, to the conduct of espionage.

In 1940, President Franklin D. Roosevelt expressed his concern that "fifth columns" were at work and authorized the attorney general, "after investigations of the need in each case," to use listening devices in order to protect the nation's defenses from the activities of suspected spies and saboteurs. Declaring that "under ordinary and normal circumstances" such surveillance should not be conducted "for the excellent reason that it is almost bound to lead to abuse of civil rights," the President indicated that his sole aim was to seek intelligence and that he was not proposing "the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases." Finally, he cautioned that the surveillance should be confined "to a minimum" and "insofar as possible to aliens."<sup>114</sup>

Nevertheless, the aftermath of World War II witnessed an expansion, rather than a contraction, of the authorization to engage in electronic spying. Attorney General Tom C. Clark, stating that it was a "troubled period in international affairs" and noting that crime was increasing "here at home," concluded (with President Truman assenting) that it was imperative to use listening devices "in cases *vitaly affecting the domestic security*."<sup>115</sup> In 1954, Attorney General Brownell cited the prevalence of FBI taps—as many as 200 at one time—as evidence of his department's vigilance.<sup>116</sup> Senate hearings in 1965 revealed that the techniques were being widely utilized by other federal agencies, notably the Internal Revenue Service.<sup>117</sup>

Shortly thereafter, Department of Justice lawyers became aware that FBI reports used in the preparation of criminal cases were not

Yung wiretaps. See *Petition for Certiorari, McGarry v. United States*, 394 U.S. 921 (1967); *Hearings on S. 928 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 2, at 140-58. The process of reconstruction is a hazardous game at best.

<sup>113</sup> *Berger v. New York*, 388 U.S. 41, 88 (1967).

<sup>114</sup> Memorandum from President Roosevelt to Attorney General Jackson, May 21, 1940, on file in the Truman Library, Independence, Mo. It is quoted at length in Theoharis & Meyer, *The "National Security" Justification for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749, 759 (1968).

<sup>115</sup> Letter from Attorney General Clark to President Truman, July 17, 1946, on file in Truman Library, Kansas City, Mo., reprinted in Theoharis & Meyer, *supra* note 114, at 760-61 (emphasis added in reprinted source). At the foot of the communication, the President noted, "I concur."

<sup>116</sup> N.Y. Times, April 21, 1954, at 18, col. 1. See generally Brownell, *The Public Security and Wire Tapping*, 39 CORNELL L. Q. 195 (1954).

<sup>117</sup> *Hearings Pursuant to S. Res. 39 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary, on Invasions of Privacy (Government Agencies)*, 89th Cong., 1st Sess. (1965).



always what they seemed to be.<sup>118</sup> Information which they supposed, from their reading of the reports, came from live informants in fact frequently emanated from inanimate bugs. In a series of criminal cases beginning with *Black v. United States*,<sup>119</sup> the department's lawyers disclosed to the courts that unlawful electronic surveillance had taken place prior to trial and that there was an issue of tainted evidence to be resolved.<sup>120</sup> In a memorandum filed with the Supreme Court while *Black* was pending, Solicitor General Marshall said:

Under Departmental practice in effect for a period of years prior to 1963 and continuing into 1965, the Director of the Federal Bureau of Investigation was given authority to approve the installation of devices such as that in question for intelligence (and not evidentiary) purposes when required in the interest of internal security or national safety, including organized crime, kidnapping and matters wherein human life might be at stake.<sup>121</sup>

In short, "national security" had come to embrace whatever Director Hoover regarded as menacing to domestic tranquility or smacking of organized crime.

The Court's opinion in *Katz*, as noted earlier, left open the question whether "safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security."<sup>122</sup> Title III undertook to resolve that question affirmatively, for the federal government. It assumes a presidential power to use the investigatory measures deemed necessary "to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government." Finally, it provides that matter may be received in evidence where "interception was reasonable . . . ." <sup>123</sup>

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<sup>118</sup> The uninitiate may be skeptical of the claim that the right hand of the Department was not fully aware of what the left hand was doing, but those who have served as attorneys of the Department know that dealing with the officialdom of the FBI is not unlike negotiating with a hostile foreign power.

<sup>119</sup> 385 U.S. 26 (1966). Several of the later cases in which similar disclosures were made are cited in *Berger v. New York*, 388 U.S. 41, 62 (1967).

<sup>120</sup> Until *Katz* was decided in 1967, the Government adhered to the view that electronic surveillance was unlawful only when accomplished by a trespass. That was concededly the situation in *Black*, where a bug was secreted in the business suite of the defendant, a Washington public relations man.

<sup>121</sup> Supplemental Memorandum for the United States, reprinted in *Hearings on S.928 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary, on the Right of Privacy Act of 1967*, 90th Cong., 1st Sess., pt. 1, at 34 (1967).

<sup>122</sup> 389 U.S. at 358 n.23.

<sup>123</sup> 18 U.S.C. § 2511(3) (Supp. IV, 1965-68), in text accompanying note 55 *supra*.

B. *Domestic Security as a Justification for Surveillance  
by Executive Prerogative*

The United States recently acknowledged that a number of demonstrators whom it has indicted for conspiracy to incite to riot in *United States v. Dellinger*,<sup>124</sup> the so-called Chicago Riots Case, were overheard by electronic eavesdropping. The Government has argued, however, that certain of the surveillances were lawful because undertaken for "security."<sup>125</sup> This contention was not advanced in an effort to introduce the conversations in evidence—which the Government announced at the outset that it did not propose to do—but in order to avoid the necessity of disclosing to the defendants the contents and surrounding circumstances.<sup>126</sup> With this objective, the United States attorney presented to the trial judge a confidential affidavit from the attorney general and sealed exhibits relating to the surveillances represented as lawful.

Acceptance of the contention that the eavesdropping was permissible would mean (1) that the defendants have no civil remedy against those responsible for the intrusion, and (2) that they have no right in the criminal proceeding brought against them to explore the issue whether the interceptions contributed to the Government's case. It would also mean that the Government, in similar circumstances, could offer intercepted conversations in evidence if it chose to do so.

The Government's reasoning, set forth in its brief to the district court, is as follows. It is notorious that there are organizations in this country which intend to "attack and subvert the existing form of our government."<sup>127</sup> Moreover, there has been "an increasing number of

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<sup>124</sup> *United States v. Dellinger*, No. 69 Cr. 180 (N.D. Ill., filed March 20, 1969). The indictment was returned in March, 1969, following a grand jury investigation of the disorders which occurred during the Democratic National Convention in August, 1968. See N.Y. Times, March 21, 1969, at 1, col. 3.

<sup>125</sup> Brief for the United States at 17-20 & *passim*, *United States v. Dellinger*, No. 69 Cr. 180 (N.D. Ill., filed March 20, 1969).

<sup>126</sup> *Id.* at 2-3. In *Alderman v. United States*, 394 U.S. 165, 180-85 (1969), and companion cases the Court ruled that a defendant was entitled to disclosure of his conversations (or those which occurred on his premises) overheard during the course of an illegal electronic surveillance. The Court rejected the Government's argument that it should be permitted to make disclosure in camera with a view to persuading the trial judge that the fruits of the surveillance were irrelevant to the case. Defendant's counsel, the Court concluded, was entitled to explore in an adversary proceeding the question whether the prosecution might be tainted, directly or indirectly, by material derived from the interceptions. However, in *Giordano v. United States*, 394 U.S. 310, 313 (1969), it emphasized that *Alderman* applied only when the surveillance was illegal, stating that "of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary."

<sup>127</sup> Brief for the United States at 18, *United States v. Dellinger*, No. 69 Cr. 180 (N.D. Ill., filed March 20, 1969). The surveillances in *Dellinger* occurred prior to the enactment of title III, and the Government suggested that they were subject to the standards prevailing when the interceptions took place, pointing to *Desist v.*

instances in which federal troops have been called upon by the states to aid in the suppression of riots.”<sup>128</sup> In such a state of affairs, it is both “reasonable” (hence permissible under the fourth amendment) and within the inherent power of the executive “to utilize electronic surveillance to gather intelligence information” in order to protect the nation from danger.<sup>129</sup> Moreover, the determination to take that step “comes within the competence of the executive” and the warrant procedure is inappropriate because it would require the judiciary to make determinations, such as appraisal of the danger to the national security, for which it is ill-suited.<sup>130</sup>

It is plain that in the attorney general’s view exercise of this prerogative would not depend upon evidence that the persons whose privacy was to become forfeit had engaged in crime or were currently involved in the commission of an offense. It would be enough that the attorney general considered them troublesome or subversive and apprehended danger. Presumably, if he believes that “Students for a Democratic Society,” an outspoken peace group, or a militant black organization is likely to engage in provocative or radical conduct, he may decide to order extensive surveillance of the membership to secure advance intelligence.<sup>131</sup>

Even if one assumes that there are circumstances in which it is permissible to monitor private conversations, Mr. Mitchell’s claim is extreme. In substance, he asserts a right to search on suspicion; a right to engage in general searches for strategic intelligence; and a right to determine for himself, under standards undeniably vague, when and for how long the suspect citizen and his associates shall be placed under secret watch of the police.<sup>132</sup>

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United States, 394 U.S. 244 (1969), which ruled that *Katz* would not be retroactively applied. However, the Government’s formulation of the executive power in cases involving domestic security, as stated in their brief in *Dellinger*, is substantially similar to that set forth in title III, 18 U.S.C. § 2511(3) (Supp. IV, 1965-68).

<sup>128</sup> Brief for the United States at 18, *United States v. Dellinger*, No. 69 Cr. 180 (N.D. Ill., filed March 20, 1969).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 19-20.

<sup>131</sup> Indeed, the press has widely reported, without contradiction from the Department of Justice, that Attorney General Mitchell has directed the FBI to keep various black organizations under surveillance. See, e.g., N.Y. Times, Aug. 10, 1969, § 6 (Magazine) at 10, col. 2-3. The Department has also acknowledged, in a proceeding before the Subversive Activities Control Board, that it conducted a surveillance of the W. E. B. DuBois Clubs. N.Y. Times, March 20, 1968, at 17, col. 1. Presumably, this took place under the prior administration.

<sup>132</sup> The last objection would not hold if the courts were to decide that antecedent judicial approval is required in so-called security cases. Yet, there is little basis for confidence that the warrant procedure would make an appreciable difference. Few judges are inclined to turn down applications for a search warrant. Note 111 *supra*. They probably would be even less disposed to do so in instances when the nation’s chief legal officer asserts a threat to national security.

The justification he offers is the protection of domestic security. Yet the Court has repeatedly warned that "even the war power does not remove constitutional limitations safeguarding essential liberties."<sup>133</sup> The Government's approach would not only override what have long been regarded as basic protections afforded by the fourth amendment; it would also "cut deeply into the right of association"<sup>134</sup> by subjecting those who join dissident organizations to possible loss of privacy and to fear of harassment.<sup>135</sup> In *United States v. Robel*, the Court condemned as overbroad a statute which made it an offense for a member of the Communist Party to continue as an employee of a defense facility, stating, "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."<sup>136</sup>

It is no less ironic that the attorney general should press a claim of executive prerogative similar to that advanced by the British cabinet and rejected by the English courts in the name of liberty more than two centuries ago in decisions which became "the byword of the times even in far-away America."<sup>137</sup> In 1762, Lord Halifax as Secretary of State issued a warrant directing the King's messengers to seize the books and papers of John Entick, author of the *Monitor* or *British Freeholder*.<sup>138</sup> The Crown saw Entick as a dangerous source of seditious utterances. The seizure accomplished, Entick responded by suing the messengers for trespass. A favorable jury verdict was upheld by the Court of Common Pleas, Lord Camden declaring: "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel."<sup>139</sup> One may fairly

<sup>133</sup> *Home Bldg. and Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934).

<sup>134</sup> *United States v. Robel*, 389 U.S. 258, 264 (1967).

<sup>135</sup> The propensity of law enforcement officials to accumulate the dossiers of persons regarded as dissident is illustrated by *Anderson v. Sills*, 106 N.J. Super. 545, 256 A.2d 298 (1969). The case involves a challenge to a state-wide intelligence system for reporting "security incidents." The incidents are described in the reporting form to include "Left wing, Right wing, Civil Rights, Militant, Nationalistic, Pacifist, Religious, Black Power, Ku Klux Klan, Extremist, etc." A Superior Court judge ordered the attorney general to destroy the files and reports submitted to him by local police pursuant to his directive, on the ground that the system of surveillance was so all-embracing as to inhibit activity protected by the first amendment. This is not to imply that techniques of electronic surveillance were authorized or utilized. The court's opinion does not discuss the means employed to gather the "security" data.

<sup>136</sup> 389 U.S. at 264.

<sup>137</sup> N. LASSON, *supra* note 67, at 45-46. Professor Lasson also points out that leading figures in the colonies—James Otis, Samuel Adams, John Hancock, and John Adams, among others—were keenly interested in the resistance by men like Wilkes and Entick to general searches for seditious libel.

<sup>138</sup> *Entick v. Carrington*, 19 How. St. Tr. 1030, 95 Eng. Rep. 807 (1765).

<sup>139</sup> *Id.* at 1063. 95 Eng. Rep. at 817 (Eng. Rep. greatly abbreviated).

say that if the official view, as currently expressed, should carry the day, the private communications of any person will be subject to surveillance whenever the attorney general shall see fit to charge, or even to suspect, him of activity characterized as dangerous to the nation.<sup>140</sup>

### C. *The Executive and Foreign Intelligence*

Many Americans doubtless have serious reservations about wiretapping and bugging by police officers—witness the prolonged resistance to federal legislation approving those practices.<sup>141</sup> But when it comes to the protection of defense secrets, espionage, and counter-espionage there is apparently wide acceptance of the idea that the game is a special and dangerous one, and that ordinary rules and restraints go by the board.

The arguments currently advanced by the Department of Justice to support executive discretion to conduct electronic surveillance in quest of foreign intelligence are not unlike those noted above: vital interests are at stake; electronic eavesdropping may perform a valuable service; and the executive is best equipped to appraise the needs and practicalities of the situation. Moreover, the choice of appropriate means falls within his prerogatives as commander-in-chief and as the principal officer in the conduct of foreign affairs.<sup>142</sup> The constitutional objections are likewise similar to those which apply in the area of domestic security: the tenet that the fourth amendment protects privacy of communication, whatever the heading with which the executive labels his inquiry; the inevitable intrusion upon the privacy of anyone who happens to fall within the indiscriminate net of surveillance; the inherent generality of searches for intelligence; and the unbridled character of a power which need never justify itself in any forum.

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<sup>140</sup> Although title III does not grant state officials authority to engage in warrantless searches on security grounds, they may proceed against dissident groups by other means: presentation to a magistrate of affidavits that the members are threatening to commit an offense dangerous to life, limb, or property and carrying a penalty of more than one year (*e.g.*, conspiracy to incite riot). Text accompanying notes 43-54 *supra*. There can be little doubt that many local prosecutors will warm to the task of seeking intelligence concerning organizations unpopular in their communities. Cf. NAACP v. Alabama, 377 U.S. 288 (1964); NAACP v. Alabama, 357 U.S. 449 (1958).

<sup>141</sup> Beginning with World War II, bills to remove restrictions imposed by § 605 of the Communications Act, 47 U.S.C. § 605 (1964), and to legalize wiretapping in specified types of cases were repeatedly introduced in Congress. Theoharis & Meyer, *supra* note 114, at 757-68. Until 1968, none of these efforts bore fruit.

<sup>142</sup> These arguments are elaborated by the Government in its *Dellinger* brief, United States v. Dellinger, No. 69 Cr. 180 (N.D. Ill., filed March 20, 1969) (a case involving claims of justified surveillance based upon the needs of both internal and external security); and its brief in United States v. Brown, No. 30966 (E.D. La. filed Aug. 22, 1967). Brown was overheard as a result of a wiretap employed to gather foreign intelligence information.

In one respect, however, the executive goes further in this area than in any other. The present administration has stated to the courts, "There can be no question that the President must and will engage in intelligence gathering operations which he believes are necessary to protect the security of the nation"—that is to say, whether or not the courts approve.<sup>143</sup> The President is, of course, to a very considerable extent the keeper of his own house and the judge of his constitutional responsibilities.<sup>144</sup> It does not follow, however, that, because the President authorizes an electronic surveillance, such as the wiretapping of a foreign embassy, in order to secure intelligence, the courts must admit in evidence information gathered by that operation. As the executive has his responsibilities, the courts have theirs, and they might well conclude that one incursion upon individual rights does not necessarily deserve another.<sup>145</sup>

Consider, by way of comparison, the following hypothetical involving the fifth amendment's protections. A soldier is suspected of having copied and sold top secret military documents to agents of a foreign government. He is held incommunicado and questioned for several days before he admits guilt. He is thereafter questioned for a further period to determine the dimensions of the security breach. He cooperates and makes detailed admissions, some of which can be independently verified. Although all of this may have been considered vital from the standpoint of the national security, the soldier may assuredly prevent the Government from using the fruits of the interrogations for prosecutorial purposes.<sup>146</sup>

It may be said in reply that the fourth amendment speaks only to unreasonable searches and seizures, whereas the fifth without qualification prohibits compulsion of incriminating testimony. Yet both amendments are designed for the protection of the individual against the coercive authority of the state. That purpose would surely be impaired if the zone of privacy which the individual may reasonably claim for himself under the fourth amendment should collapse whenever the state asserts a strong interest in securing information. The authorities, it should be recalled, had a strong interest in collecting lawful duties from reluctant American colonists and a reasonable basis for concluding that

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<sup>143</sup> Brief for the United States at 11, *United States v. Dellinger*, No. 69 Cr. 180 (N.D. Ill., filed March 20, 1969).

<sup>144</sup> The President's power to employ agents to gather intelligence was expressly recognized in *United States v. Totten*, 92 U.S. 105, 106 (1876).

<sup>145</sup> As observed in *Frank v. Maryland*, 359 U.S. 360, 365 (1959), the fourth amendment serves ultimately as a shield against exploitation of information improperly obtained "to effect a further deprivation of life or liberty or property."

<sup>146</sup> The hypothetical case posed in the text is not based on reported cases—prosecutorial authorities, of course, recognize the bar to the use of testimony obtained by coercion—but it is far from unreal.

the most effective means of dealing with the prevalent evasion was by the conduct of general searches for contraband. What is reasonable from the standpoint of achieving the sovereign's purposes is not necessarily reasonable from the standpoint of the subject's interest in preserving "some shelter from public scrutiny . . . some inviolate place which is a man's castle."<sup>147</sup>

It is notable that between 1940 and 1968 the federal government proceeded on the assumption that, whatever the reason for an investigation, it could not properly utilize any information obtained by a wiretap<sup>148</sup> or trespassory electronic surveillance for prosecutorial purposes. President Roosevelt's circumscribed authorization to the attorney general said as much.<sup>149</sup> In a brief filed with the Supreme Court in 1968, the solicitor general stated that "the government has not claimed that evidence obtained by electronic eavesdropping in the course of a national security investigation is admissible in a criminal trial."<sup>150</sup> The question in that litigation and in companion cases was whether the Government, having acknowledged that it had overheard the defendants, was required to make full disclosure of the circumstances and contents of the conversations. Contending that an examination of the interceptions would establish their irrelevancy to the criminal charges, the Government urged that the initial submission should be to the trial judge so that he might determine, in camera, whether there was need for disclosure to the defendants. The Court rejected that procedure, ruling that when an illegal surveillance has taken place the defendant is entitled to full disclosure so that he may explore the question of possible taint in an adversary proceeding. It left open, however, the question whether it is unlawful for the attorney general to authorize electronic surveillance in the interest of national security. This reservation, of course, stimulated the contention, now litigated in lower federal courts, that such surveillance falls outside the inhibitions of the fourth amendment.<sup>151</sup>

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<sup>147</sup> United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), *aff'd*, 343 U.S. 747 (1952).

<sup>148</sup> Notwithstanding the *Olmstead* decision, evidence obtained by wiretapping encountered the statutory prohibition imposed by the Communications Act of 1934, 47 U.S.C. § 605 (1964).

<sup>149</sup> Text accompanying note 114 *supra*.

<sup>150</sup> Brief for the United States at 8-9, *Ivanov v. United States*, 394 U.S. 165 (1969). *Ivanov* was a companion case to *Alderman v. United States*, discussed in note 126 *supra*.

<sup>151</sup> The Government filed an unsuccessful petition for rehearing in *Ivanov*, contending that the requirement of broad disclosure imposed by *Alderman* would have serious impact upon government intelligence operations in foreign affairs. As indicated by its petition, it was not yet clear to the Government that the Court had reserved the question of the lawfulness of the *Ivanov* surveillance—a point which became evident after *Giordano v. United States*, 394 U.S. 310 (1969). The Government, concerned by what it supposed to be the practical effect of the *Ivanov* decision,

The sound answer is that the judiciary should adopt the same approach whether the attorney general was engaged in seeking evidence of Mann Act violations, tax evasion, or radical proclivities, or was simply casting his lines for foreign intelligence information. Indeed, insofar as the amendment reflects historic opposition to the general search, the quest for strategic intelligence, whether in the name of security or otherwise, is the most difficult to justify. Quite apart from that consideration, however, the individual's right not to be convicted on the basis of information obtained through intrusions which violate the very core of his privacy ought not to be diminished merely because the suspected offense is serious or the state's interest in seeking information is substantial.

## VI. CONCLUSION

This Article has not sought to assess the value of electronic surveillance as a technique of investigation and law enforcement. On that score, there is a wide difference of opinion even among prosecutors,<sup>152</sup>

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pointed out in the petition that during the course of an electronic surveillance seeking foreign intelligence, a person who is or becomes a defendant in an ordinary criminal case may be overheard "merely by accident or happenstance, because he simply stumbles into it." Petition for Rehearing at 8, *Ivanov v. United States*, 394 U.S. 165, rehearing denied, 394 U.S. 939 (1969). The comment is, of course, pertinent to the proposition urged above that electronic searches cannot be confined to predetermined channels. In the case of such an accidental overhearing, the petition states, it may be readily apparent that a determination of irrelevancy can be made by the trial judge without any risk to the defendant. *Id.* at 7-9. For example, a defendant may have made an inconsequential phone call to a foreign embassy at a time when the embassy's lines were being tapped. Plainly, a disclosure of the circumstances of the wiretapping might cause serious embarrassment. Why not, therefore, permit the trial judge to make an initial determination whether the overhearing could have conceivably affected the Government's case against the defendant?

Justice Fortas's opinion in *Alderman* supported this line of argument. He thought that the Government's suggested screening procedure should be followed where a "disclosure of some of the material may pose a serious danger to the national interest." *Alderman v. United States*, 394 U.S. 165, 210 (1969) (Fortas, J., concurring in part, dissenting in part). This author sees no valid objection to this approach if limited, as the Government proposed, to the case in which it is obvious that the intercepted material bears no relation to the criminal charges. Such a procedure is comparable to that followed in cases in which a defendant seeks access to grand jury minutes. See *Dennis v. United States*, 384 U.S. 855 (1966). Moreover, review would be available by sealing the matter submitted to the trial judge and forwarding it as part of the appellate record. See *Palermo v. United States*, 360 U.S. 343 (1959).

The petition for rehearing in *Ivanov* was denied, 394 U.S. 939 (1969), but as noted above it later became clear that the lawfulness of the *Ivanov* surveillance might be litigated on remand.

<sup>152</sup> Former Attorney General Ramsey Clark is prominent among those who have asserted that the yield is not worth the investment. This is probably a minority view among law enforcement officials, most of whom have a natural disinclination to remove any weapon from their arsenal. Various expressions of opinion have been collected by Professor Herman Schwartz, *supra* note 42, at 498-508.

Perhaps it should also be noted that electronic surveillance obviously has little value in the area which is currently causing the greatest public concern—the commission of crimes of violence. It lends itself much more readily to the investigation of activities which are of a continuing nature, such as gambling and prostitution, and it has been most widely utilized in those areas. See S. DASH, R. SCHWARTZ & R. KNOWLTON, *THE EAVESDROPPERS* 66, 152 (1959).



and all that can be said with assurance is that there is no available body of data from which reliable conclusions can be drawn. However, it can be said that the price is intolerable, even if one assumes that the technique can contribute measurably to strategic intelligence and detection of crime. If older methods of eavesdropping were a "dirty business,"<sup>153</sup> the possibilities now within grasp are nothing less than poisonous.

A requirement of antecedent judicial approval is a largely illusory safeguard. Procurement of a search warrant more often than not is little more than a formality. In any case, no warrant procedure can confine an electronic surveillance to the predictable and the relevant. Such a search is as errant as shifting winds. Nor are there means by which even the zealous magistrate can effectively control the dissemination and all of the possible uses of the information surreptitiously gathered.

Basically, the justification offered by those who would legitimate electronic intrusion is the asserted need of our society to protect itself from lawlessness by the most effective means available. But is it really to be supposed that the weaknesses and deficiencies of a society in which crime and disorder have become rife will be overcome by authorizing the nation's police officers to become insidious spies monitoring the private conversations of the citizenry?

The Supreme Court has laid to rest the concept that the fourth amendment is violated only when there is a physical trespass, but unfortunately has encouraged the notion—upon which the Congress has now fastened with a vengeance—that both one's premises and one's privacy of communication may be secretly invaded if only a magistrate nods or the attorney general sniffs danger to the interests of "security." These are not imposing limitations. At all events, a decent and civilized society should provide some area in which the privacy of the individual is inviolate and he is free to communicate as he pleases without fear of the state's intrusion.<sup>154</sup>

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<sup>153</sup> *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting).

<sup>154</sup> While an unequivocal determination that electronic eavesdropping is incompatible with the fourth amendment would not automatically put an end to the practice, it surely would operate as a very substantial deterrent. This assumes, of course, that the exclusionary principle would be rigorously applied to evidence obtained in violation of the amendment. In this connection, it may be observed that courts are not wholly dependent upon disclosures of official misfeasance volunteered by prosecutors. In *Alderman*, the Supreme Court directed the solicitor general to respond to allegations by the defendants that illegal surveillance might have occurred. 394 U.S. at 186. Orders of that kind are not taken lightly by prosecutorial authorities.