Comments

PEN REGISTER EVIDENCE WITH ONE-PARTY CONSENT:[1] SHOULD IT BE ADMISSIBLE?

A councilman and his wife received harassing telephone calls that were in violation of New York law.[2] They reported the incidents to the police and were eventually able to suggest that Mr. Green might be the offending caller. After contacting the telephone company for assistance, the police were told about the pen register, a device which could be placed on a phone line and identify every number dialed from that phone. It could not record speech, indicate whether the call was answered or identify the telephone numbers of incoming callers. The police installed the pen register on Green's line after receiving the councilman's consent. It was readily confirmed that Green's phone was being used to make the calls as the pen register recorded thirty-five calls from his phone to the councilman's in a single day. At Green's trial his attorney moved to suppress this evidence. *Held*, motion denied: Since one party had consented to the tap and alternately, since the phone company had

1. The term *one-party consent* or *consent of one party* as used in this comment will refer to the factual situation where one party consents to having his phone conversation with another monitored and information so gained is used, in court, against the other party.

2. N.Y. PENAL LAW § 240.30 (McKinney 1965) is violated whenever harassing calls are made, even if no conversation takes place.

done the actual installing of the pen register[3] the information obtained was admissible as evidence. *People v. Green*, 63 Misc. 2d 435, 312 N.Y.S. 2d 290 (Crim. Ct. of City of NY, Kings County 1970).

Consent of one party to a communication has been held to eliminate the need for a warrant when tapping phones.[4] This comment will examine the consent doctrine under the laws of New York, the federal statutes and the United States Constitution. It will attempt to determine whether one person who has some communication with another can consent to having all the communications of the other monitored and, indeed, whether one-party consent is still a valid constitutional consideration.

State and Federal Law on Consent

In regard to the consent of one party legalizing a tap without a warrant, the laws of New York[5] are not materially different from the federal laws.[6] Both allow a tap when one party consents to the overhearing of his communication with another.[7] Evidence gained in this way is admissible in any trial or proceeding.[8] No evidence obtained in violation of the federal wiretap statutes is admissible in any state or federal court.[9] Since the federal statutes are more stringent than New York laws, an independent discussion of the laws of New York is not relevant.

It is well settled that the pen register intercepts a communication.[10] It has been argued that persons could communicate by

3. This alternate holding will not be discussed. Let it suffice to say that since there was a clear police involvement the holding is not well founded. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); Harmon v. Commonwealth, 209 Va. 574, 166 S.E.2d 232 (1969).

4. Rathbun v. United States, 355 U.S. 107 (1957); Wilson v. United States, 316 F.2d 212 (9th Cir. 1963); People v. Bates, 163 Cal. App. 2d 847, 330 P.2d 102 (1958).

5. N.Y. Code of Crim. Procedure §§ 813 J-M (McKinney Supp. 1970).

6. 18 U.S.C. §§ 2510-20 (Supp. V 1968); 47 U.S.C. § 605 (Supp. V 1968).

7. *See* N.Y. Code of Crim. Procedure § 813 J(1) (McKinney Supp. 1970); 18 U.S.C. §§ 2511(2)(c), (d) (Supp. V 1968). Calif. law concerning police interception and use of communications is also substantially the same. *See* Cal. Pen. Code § 633 (West 1970).

8. Not all states have adopted this law. *See* People v. Kurth, 34 Ill. 2d 387, 216 N.E.2d 154 (1966) (holding that no wiretap evidence can be used against a non-consenting party).

9. 18 U.S.C. § 2515 (Supp. V 1968); *see* Lee v. Florida, 392 U.S. 378 (1968).

10. United States v. Dote, 371 F.2d 176, 180 (7th Cir. 1966); Huff v. Mich. Bell Telephone Co., 278 F. Supp. 76, 77 (E.D. Mich. 1967); United States v. Caplan, 255 F. Supp. 805, 808 (S.D. Mich. 1966); People v. Green, 63 Misc. 2d 435, 312 N.Y.S.2d 290, 293 (Crim. Ct. 1970). *Contra*, People v. Schneider, 45 Misc. 2d 680, 257 N.Y.S.2d 876 (Sup. Ct. 1965).

allowing the phone to ring a specified number of times and thereby convey a message without the recipient even lifting the receiver.[11] While this is possible, the more rational logic would be that a telephone is so tied up with communication that any tampering with it will adversely affect communication. The Omnibus Crime Control Act[12] has adopted those views and prohibits the illegal interception of any information identifying the parties to the communication.[13] Thus, evidence obtained by the unconsented to use of a pen register without a warrant is clearly inadmissible.[14] The question then becomes whether consent of one party removes the need for a warrant.

The federal authorization for a tap with one-party consent is primarily based on *Rathbun v. United States*.[15] There, where one party voluntarily allowed a police officer to listen in on his preexisting extension phone, the evidence obtained against the other party was held admissible. This holding was based on the principles that one party takes a risk that the other party will betray him,[16] and also that without clear congressional intent, there may be no interference with the normal use of a phone extension.[17] It was but a short step from *Rathbun* to allowing the use of specially installed extensions, electrical and mechanical devices[18] and recorders[19] with one-party consent.[20] This is the present state of federal law[21] and few cases have objected.[22] The use of the pen

11. United States v. Dote, 371 F.2d 176, 181 (7th Cir. 1966); United States v. Caplan, 255 F. Supp. 805, 808 (S.D. Mich. 1966).
12. 18 U.S.C. §§ 2510-20 (Supp. V, 1968).
13. *Id.* § 2510(8).
14. United States v. Guglielmo, 245 F. Supp. 534, 536 (N.D. Ill. 1965), *aff'd sub nom.* United States v. Dote, 371 F.2d 176 (7th Cir. 1966); *see* United States v. Caplan, 255 F. Supp. 805 (S.D. Mich. 1966).
15. 355 U.S. 107 (1957).
16. *Id.* at 111; United States v. White, 405 F.2d 838, 845-47, n.7 845 (7th Cir. 1969), *cert. granted* 394 U.S. 957 (1969); People v. Jones, 254 Cal. App. 2d 200, 62 Cal. Rptr. 304 (1967).
17. 355 U.S. at 109-10.
18. *See* Wilson v. United States, 316 F.2d 212 (9th Cir. 1963).
19. *See id.*; Amsler v. United States, 381 F.2d 37 (9th Cir. 1967); United States v. McGuire, 381 F.2d 306 (2d Cir. 1967).
20. *See* State v. Hulsey, 15 Ohio App. 2d 153, 239 N.E.2d 567, 570 (1968).
21. *See* §§ 18 U.S.C. 2511(2)(c), (d) (Supp. V 1968) (saying consent makes the interception legal, without mentioning the means used).
22. *But see* Lee v. Florida, 392 U.S. 378, 381 (1968); United States v. White, 405 F.2d 838 (7th Cir. 1969); United States v. Polakoff, 112 F.2d 888, 889 (2d Cir. 1940) (decided prior to *Rathbun*); United States v. Jones,

register with this kind of consent has been unflinchingly approved.[23] But should it be? The interception of calls to the consenting party is clearly legal, but it will be a rare instance where the pen register does not record a call to a non-consenting party. It is these calls that cause difficulty. Unless they fit into some exception of the Omnibus Crime Control Act of 1968[24] their unwarranted interception is clearly illegal. The question of admissibility of calls to consenting parties becomes one of policy, that is, whether the legally intercepted calls may be used even though their interception requires the illegal interception of other calls. Justice Brandeis has aptly said:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[25]

It thus becomes necessary to balance Brandeis' principle against the need to capture criminals.

Public policy may seek to exclude legal pen register evidence in order to discourage the accompanying illegal interceptions;[26] however, where the fruits of an illegal search may be separated from those of a legal search, the untainted fruits are admissible.[27] Their exclusion is not required by the present federal laws. There does not appear to be a case decided under these federal laws which excludes fruits of the consented-to-use of a pen register.

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292 F. Supp. 1001, 1008 (D.D.C. 1968); Barber v. State, 172 So. 2d 857 (Fla. 1965) (Rawls, J., dissenting).

23. *See* State v. Hulsey, 15 Ohio App. 2d 153, 239 N.E.2d 567 (1968); Harmon v. Commonwealth, 209 Va. 574, 166 S.E.2d 232 (1969).

24. 18 U.S.C. §§ 2511(2)(a)-(d),(3) (Supp. V 1968) (exceptions to coverage of act); *see* text accompanying notes 31-38 *infra.*

25. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

26. 18 U.S.C. § 2511 (Supp. V 1968) would be the section violated.

27. *See* United States v. Caplan, 255 F. Supp. 805, 808 (S.D. Mich. 1966).

REASONS BESIDES CONSENT FOR ADMITTING PEN REGISTER EVIDENCE: EXCEPTIONS TO THE OMNIBUS CRIME CONTROL ACT

It has been argued that where a communication device is being illegally used, the user has no right to privacy under federal law.[28] However, if this principle is explored one discovers that it generally applies only where any communication via the particular means would be illegal. It does not apply where the nature of the communication makes the call illegal.[29] Thus, the telephone company may tap a line to see if unauthorized long distance calls are being made or to see if they are being otherwise cheated; but not for any other purpose.[30]

Some courts have held that the pen register is used in the normal course of telephone company business[31] and as such is authorized by the Omnibus Crime Control Act.[32] Each year over three-quarters of a million harassing calls are made[33] and if the phone system is to be protected from this abuse some form of detection device is needed.[34] That the pen register is normally used in this way is not, however, clear. It would only be useful where the harassed party has a fair idea of the caller's identity. A more normal use of the register would be to determine if a home phone was being used to conduct a business,[35] to check for a defective dial[36] or for overbilling.[37] The admissibility of records, which are ordinarily kept for all long distance calls, has thus been distinguished from " the manipu-

28. United States v. Sugden, 226 F.2d 281, 285 (9th Cir. 1955); United States v. Hanna, 260 F. Supp. 430, 433 (S.D. Fla. 1966); State v. Holliday, 169 N.W.2d 768, 778 (Iowa 1969); Commonwealth v. Voci, 185 Pa. Super. 563, 138 A.2d 232, 233 (1958).

29. United States v. Sugden, 226 F.2d 281, 285 (9th Cir. 1955); Huff v. Mich. Bell Telephone Co., 278 F. Supp. 76, 78 (E.D. Mich. 1967); United States v. Hanna, 260 F. Supp. 430 (S.D. Fla. 1966). *See also* State v. Holliday, 169 N.W.2d 768 (Iowa 1969) (the reasoning goes beyond the illegal act theory).

30. Huff v. Mich. Bell Telephone Co., 278 F. Supp. 76, 78 (E.D. Mich. 1967).

31. State v. Holliday, 169 N.W.2d 768, 778-79 (Iowa 1969).

32. 18 U.S.C. §§ 2510(5)-(5) (a) (ii) (Supp. V 1968).

33. State v. Holliday, 169 N.W.2d 768, 778 (Iowa 1969).

34. *See* State v. Coleman, 270 N.C. 357, 154 S.E.2d 485, 491 (1967).

35. *See* Schmukler v. Ohio Bell Telephone Co., 66 Ohio L. Abs. 213, 116 N.E.2d 819 (Common Pleas 1953).

36. United States v. Dote, 371 F.2d 176, 181 (7th Cir. 1966).

37. *Id.*

lative use of a pen register . . . ."[38]

THE CONSTITUTIONAL ARGUMENT: CONSENT

It is now settled that an unreasonable wiretap is a search and seizure in violation of the fourth amendment and as such is inadmissible in any state or federal court.[39] While *Rathbun* was an interpretation of a federal wiretap statute,[40] it has been considered the constitutional limit as well. Thus, wiretaps with one-party consent have been considered constitutional.[41] The recent case of *Katz v. United States*[42] may have gone far towards eradicating this well established consent doctrine.

The main import of *Katz* was to end the need for a trespass in order to find a fourth amendment violation in regard to wiretap. The Court said the fourth amendment protects people, not places; whatever a person seeks to keep private, even in a public place, may be protected.[43] The requirements are a subjective and reasonable expectancy of privacy.[44] It is significant that *Katz* makes no mention of one-party consent as a possible exception to the doctrine that all searches must be under prior judicial control in order to be constitutional.[45] The fourth amendment would become illusory if such a meaningless form of consent could strip a person of his rights,[46] and if the amendment is to remain viable, one party must not be able to waive the rights of another.[47] The distinction between third-party monitoring and monitoring with one-party consent has been eliminated by *Katz*,[48] and only a judge can authorize such an infringement of a person's rights.[49] Except in extraordinary circumstances, a warrant must be obtained.[50]

The fourth amendment should be judiciously protected lest it

38. United States v. Covello, 410 F.2d 536, 542 (2nd Cir. 1969).
39. Alderman v. United States, 394 U.S. 165 (1969); *see* Mapp v. Ohio, 367 U.S. 643 (1961).
40. Act of June 19, 1934, ch. 652 § 605, 48 Stat. 1103-04.
41. People v. Jones, 254 Cal. App. 2d 200, 62 Cal. Rptr. 304 (1967).
42. 389 U.S. 347 (1967).
43. *Id.* at 351-53.
44. *Id.* at 361 (Harlan, J., concurring).
45. United States v. Jones, 292 F. Supp. 1001, 1007-08 (D.D.C. 1968).
46. United States v. White, 405 F.2d 838, 843, 845 (7th Cir. 1969).
47. *See id.*; United States v. Jones, 292 F. Supp. 1001, 1008 (D.D.C. 1968).
48. United States v. Jones, 292 F. Supp. 1001, 1008 (D.D.C. 1968); United States v. White, 405 F.2d 838, 845 (7th Cir. 1969).
49. United States v. Jones, 292 F. Supp. 1001, 1008 (D.D.C. 1968).
50. Frank v. Maryland, 359 U.S. 360, 380 (1959) (Douglas, J., dissenting) This case was decided before *Katz* and is independent of it. Note that even after *Katz* a person will not always have a reasonable expectation of privacy while using a phone; *see* United States v. White, 405 F.2d 838, 845 (7th Cir. 1969).

be wiled away. With the increase in our population and the resulting decrease in space, the constitutional right of privacy is more necessary than ever.[51] The technological advances in eavesdropping equipment raise many important questions. "The answers we find will determine whether Americans in the last part of the twentieth century will be free or craven, independent or guarded."[52] It is but a short step from efficient law enforcement to a police state where human rights are crushed.[53]

EVEN IF CONSENT IS VALID, IS THE PEN REGISTER?

Even if *Katz* were held not to apply and *Rathbun* was given full force, the pen register would still not meet constitutional muster. The conduct authorized by *Rathbun* was extremely limited.[54] It was only after many steps had been taken by lower courts that *Rathbun* was expanded into today's consent doctrine.[55]

The use of any recording device or mechanical aid could be enough to remove an eavesdrop from *Rathbun's* protection.[56] *Lee v. Florida*[57] recently held that evidence must be suppressed where police were somehow placed on a party line with the defendant and obtained evidence against him. Equal emphasis was put on the lack of consent and the fact that this extension was installed for the sole purpose of obtaining evidence and was not in previous ordinary use. In its holding the Court said that this interception was a far cry from the conduct authorized by *Rathbun*.[58]

The use of a pen register is also a far cry from the conduct in *Rathbun*. The sole purpose of the pen register in such a case is the detection of criminal activity; it is installed especially for this purpose and it is not a normal piece of equipment at the consenting party's residence. In *Ratbun* and most of the cases interpreting it,

51. Commonwealth v. Brinkley, 362 S.W.2d 494, 497-98 (Ky. 1962) (Moremen, J., dissenting).
52. SENATOR E. LONG, THE INTRUDERS viii (1967) (foreword by Vice President Hubert H. Humphrey).
53. People v. Cahan, 44 Cal. 2d 434, 447, 282 P.2d 905, 912 (1955); *see* Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).
54. *See* Rathbun v. United States, 355 U.S. 107 (1957).
55. *See* cases cited notes 18-23 and accompanying text *supra*.
56. Barber v. State, 172 So. 2d 857, 862 (Fla. 1965) (Rawls, J., dissenting).
57. 392 U.S. 378 (1968).
58. *Id.* at 381.

the only communication intercepted was the communication to the consenting party. Not so with the pen register. It intercepts every call made by the suspect and thus lays bare more information about more people than was ever contemplated by *Rathbun*.

Could a Warrant Authorize a Pen Register in a Harassment Case?

Even if the pen register was used with a warrant[59] the resulting evidence may not be admissible. In an ordinary warrant situation each call is important. A narcotics dealer could make a relevant statement, or attempt a sale in any call he makes or receives. Where, however, a person is suspected of making harassing calls to a single party, calls to other persons are irrelevant. Allowing the monitoring of all calls in such a situation resembles the general search feared by the framers of our Constitution.[60] Generally, when conducting a search, any evidence lawfully obtained will be admissible, but the area of the search is limited by the item sought.[61] Thus a desk drawer could not be opened when the warrant is for the seizure of a car. Likewise if the telephone number of the complaint began with 276, it would be unnecessary to record any number the defendant calls beginning with 583. If possible, the pen register should be altered so as not to record past this point. Such an alteration would limit objections to the use of a pen register with a warrant.

If possible the pen register should be modified, however, practically speaking, if it cannot be altered it should be allowed. The protections afforded by a warrant will be sufficient to protect the great majority of citizens.[62] If no device could be produced that was more selective in its recording than the pen register,[63] its exclusion would be absurd. It would be akin to saying that no paper can be seized because others must be read in order to find the one specified by the warrant. In wiretapping the scope of investigation

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59. This may not be possible in a harassment case since under the present federal statute only certain crimes qualify for a warranted tap; *see* 18 U.S.C. § 2516 (Supp. V 1968). There would be a strong argument to modify this requirement in harassment cases, *i.e.* a need exists to capture these persons and a warrant affords more protection than one-party consent.

60. *See* Stanford v. Texas, 379 U.S. 476, 480-81 (1965).

61. Lafave, *Search And Seizure: "The Course Of True Law . . . Has Not . . . Run Smooth"* 1966 U. of Ill. L.F. 255, 274-75, 274, n.128.

62. *See* 18 U.S.C. § 2518 (Supp. V 1968).

63. There is a device, aptly called a trap, which automatically traces any call made to a harrassed person from within his own exchange group. While this device is still limited in the area in which it is effective, it should still be very useful.

should be the narrowest possible that will still satisfy the requirements of the search. There is no need for more stringent requirements if a warrant must be previously obtained.

The fourth amendment can be rationally expanded to exclude pen register evidence obtained with a warrant. If the admissibility of evidence obtained with the protections of a warrant is questionable, its use without a warrant should clearly be unreasonable and the evidence inadmissible.

The First Amendment

The first amendment is an important consideration when dealing with wiretapping.[64] Throughout the history of the Bill of Rights, the first, fourth and fifth amendments have been inseparably tied.[65]

A citizen should have the right to use his phone freely without the inhibition that would be necessarily present if he feared his calls were being monitored. In normal circumstances a party can be relatively certain his phone is not being tapped unless there is probable cause to suspect him of serious crime, or the receiver of his call is allowing another party to listen in. He can effectively guard against both of these contingencies by not associating with crime and by being careful around persons he does not trust. If the pen register continues to be installed without a warrant upon the consent of any party who complains to the police, the assurances of privacy will dwindle. It will no longer take probable cause to tap a phone but only a hunch of a spiteful neighbor.

While an ordinary tap could affect what we say,[66] the pen register could even affect who we are willing to call. It is all too easy to dismiss the pen register as a harmless device which cannot record conversations.[67] However, sometimes it could be more dangerous than a full tap. Great damage could be caused by the pen register where an innocent call is made to a suspicious person, where a

64. United States v. White, 405 F.2d 838, 845 n.8 (7th Cir. 1969).
65. Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting).
66. Greenawalt, *The Consent Problem In Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 Colum. L. Rev. 189, 216-17 (1968).
67. *See* People v. Schneider, 45 Misc. 2d 680, 257 N.Y.S.2d 876 (Sup. Ct. 1965).

wrong number is dialed,[68] or where some third party is using the suspect's phone for an illegal purpose.[69] Since these dangers, if widespread, could inhibit the ordinary use of the phone, their cause should be eliminated. If it becomes necessary to use the exclusionary rule[70] to maintain free speech, that should be done.

Some will never be convinced that the pen register in and of itself is important or dangerous. Those persons should realize that even if the device is meaningless, the legal theory which allows its use could be devastating. They should once again allow Brandeis to set the mood:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[71]

Conclusion

The pen register is a deceptively simple device, but its use, without a warrant, can pierce the hearts of the first, fourth and fifth amendments. Even if one-party consent is still a constitutionally valid consideration it cannot be expanded to authorize the use of the pen register.

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68. *See* State v. Hulsey, 15 Ohio App. 2d 153, 239 N.E.2d 567 (1968).
69. *See* Carswell v. S.W. Bell, 449 S.W.2d 805, 813-14, 816 (Tex. Ct. Civ. App. 1969); Jarvis v. S.W. Bell, 432 S.W.2d 189 (Tex. Cit. Civ. App.).
70. *See* Lee v. Florida, 392 U.S. 378, 386-87 (1968); People v. Cahan, 44 Cal. 2d 434, 447, 282 P.2d 905, 912-13 (1955).
71. Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting).