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The Applicability of the Fourth Amendment's Search and Seizure Protection to Electronic Eavesdropping

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Bosch: The Applicability of the Fourth Amendment's Search and Seizure Pr

CONSTITUTIONAL LAW: THE APPLICABILITY OF THE FOURTH AMENDMENT'S SEARCH AND SEIZURE PROTECTION TO ELECTRONIC EAVESDROPPING

In *Katz v. United States*[1] the petitioner was convicted in the district court of transmitting wagering information by telephone in violation of a federal statute.[2] The government, over the petitioner's objection,[3] was allowed to introduce evidence consisting of telephone conversations overheard by Federal Bureau of Investigation agents through the use of an electronic listening and recording device attached to the outside of a public telephone booth. In affirming the conviction, the Ninth Circuit Court of Appeals held that the recording had not been obtained in violation of the fourth amendment as there had been no physical entrance into the area occupied by the petitioner.[4] The Supreme Court reversed. Although there was no actual physical penetration of the area occupied by the petitioner, the electronic listening device vio-

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

[2] 18 U.S.C. § 1084 (1964). The statute provides in part:
(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, . . . shall be fined not more than $10,000 or imprisoned not more than two years, or both.

[3] The petitioner, relying on Silverman v. United States, 365 U.S. 505 (1961), argued that the evidence obtained by recording the conversation constituted an illegal search and seizure in violation of the fourth amendment, and as such was inadmissible. Evidence secured by an unlawful search and seizure is inadmissible in federal courts by virtue of Weeks v. United States, 232 U.S. 383 (1914), and this protection was extended to state courts by Mapp v. Ohio, 367 U.S. 643 (1961).

[4] Katz v. United States, 369 F.2d 130 (9th Cir. 1966).

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lated the privacy upon which he justifiably relied and thus constituted an illegal search and seizure under the fourth amendment.

The Court stated that in earlier cases it had "expressly held that the Fourth Amendment governs not only the seizure of tangible items but extends as well to the recording of oral statements overheard without any 'technical trespass . . . under local property law'."[5] The Court then proposed that the fourth amendment protects people and not simply areas or places against unreasonable searches and seizures. Following this line, the Court found that "the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[6] Justice Stewart writing for the majority[7] concluded:

> [T]hat the underpinnings of *Olmstead and Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.[8]

In his lone dissent, Justice Black had a two-fold objection:

> (1) I do not believe that the words of the Amendments will bear the meaning given them by today's decision and (2) I do not believe that it is the proper

[5] 389 U.S. at 353, *quoting* Silverman v. United States, 365 U.S. 505 (1961).

[6] 389 U.S. at 353.

[7] The Court rendered a 7 to 1 decision with Justice Stewart delivering the opinion of the Court. Justice White and Justice Douglas wrote concurring opinions, while Justice Black wrote the lone dissent. Justice Marshall did not participate.

[8] 389 U.S. at 353.

> role of this Court to rewrite the Amendment in order to bring it into harmony with the time and thus reach a result that many people believe to be desirable.[9]

A perusal of the leading cases in this area reveals much support for the dissent and shows that this new meaning and interpretation given to the fourth amendment is in fact just that—a new meaning and interpretation. It will further reveal that this decision did not logically evolve through the "erosion" of prior cases as the majority opinion suggests.

The fourth amendment states:

> 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 warrant 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 searched.[10]

"Persons, houses, papers and effects"[11] imply a meaning of material, tangible objects capable of being both searched and seized, and words, in their ordinary meaning, are incapable of either. The constitutional requirement of "particularly describing"[12] is also incapable of being satisfied. While it may be conceded that a future conversation can be described, it is virtually impossible to describe a conversation not yet held with any degree of specificity so as to satisfy the "particularly describing" requirement.

In *Carrol v. United States*,[13] the Court said that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interest as well as the interest and right of individual citizens."

[9] *Id.* at 364.
[10] U.S. CONST. amend. IV.
[11] *Id.*
[12] *Id.*
[13] 267 U.S. 132, 149 (1924).

On the surface, this statement appears to be incompatible with the strongly held belief that the Constitution is a "living document" designed to meet needs that were unknown at the time it was written, but that is not so.

At the time of the adoption of the fourth amendment, electronic listening and recording devices were, of course, unknown. Eavesdropping, however, was not unknown at that time. The Supreme Court in *Berger v. United States*[14] recognized eavesdropping as an "ancient practice" which was condemned as a nuisance at common law. "At one time the eavesdropper listened by naked ear under the eaves of houses or their windows seeking out private discourse."[15] Traditionally evidence obtained by eavesdroppers has been admitted both in American and English courts. The test for admissibility has not been how and by whom it was obtained but whether it was relevant and obtained by first-hand knowledge.[16] Since the evidence obtained by eavesdropping by an individual is admissible, it is hard to see the rationale in rejecting proferred eavesdropped evidence obtained by the use of a machine. Practically and realistically speaking, the use of modern electronic devices to listen in on a conversation is nothing more than the "ancient" variety of eavesdropping refined to a greater degree of efficiency.

The framers of the Constitution must certainly have been aware of this "ancient" practice and could easily have worded the amendment so that it included overheard conversations had they desired to do so. Their historical purpose was basically to prevent the use of government force in breaking into people's homes and other buildings, searching, ransacking and seizing personal belongings without a proper warrant. It is in this area that the Court should and does give the amendment a liberal construction in order to prevent war-

[14] 388 U.S. 41 (1967).
[15] *Id.* at 45 (citing 4 BLACKSTONE, COMMENTARIES 168).
[16] *Id.* at 71, 72 (Black, J., dissenting).

rantless searches and seizures of tangible property. It has been said in opinions that the fourth amendment should "be liberally construed to effect the purpose of the framers of the Constitution in the interests of liberty".[17] "But," as Justice Taft so succinctly stated in *Olmstead v. United States*,[18] "that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers and effects, or so to apply the words search and seizure as to forbid hearing or sight".

The first time the Supreme Court considered the applicability of the fourth amendment to electronic listening devices was in *Olmstead v. United States*,[19] a wiretapping case. There the Court in no uncertain terms held that the securing of evidence through the use of wiretapping did not violate the fourth amendment. The basis for the Court's decision was that the words of the amendment could not be construed to encompass eavesdropping. The Court said: "[T]he Amendment itself shows that the search is to be of material things — the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized . . . ."[20] According to the majority, there was nothing "seized" and nothing "searched" and the evidence was obtained only through the sense of hearing.

[17] Olmstead v. United States, 277 U.S. 438, 465 (1928). (Justice Taft referring to opinions by Justice Bradley in Boyd v. United States, 116 U.S. 616 (1885) and Justice Clarke in Gouled v. United States, 255 U.S. 298 (1920).)

[18] 277 U.S. 438, 465 (1928).

[19] 277 U.S. 438 (1928).

[20] *Id.* at 464-65. Mr. Justice Taft went on to say:
The language of the Amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house any more than are the highways along which they are stretched.

In *Goldman v. United States,*[21] a case strickingly similar to the case at hand, the Court reaffirmed the position taken in *Olmstead.* Here a detectaphone had been placed on the wall of an adjoining room by federal agents, and they recorded the overheard conversations. The evidence, so obtained, was held to be admissible as eavesdropping; therefore, it did not constitute a fourth amendment violation.

The majority in *Katz* heavily relied on *Silverman v. United States.*[22] Their contention was that *Silverman* expressly holds "that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law'."[23]

The petitioner's counsel in *Silverman* urged the Court to reconsider the *Goldman* and *Olmstead* decisions and to reexamine the rationale behind those decisions. This the Court expressly refused to do. Since the basis for *Goldman* and *Olmstead* was that conversations could neither be searched nor seized and since the Court expressly refused to overrule or even re-examine those cases, it is hard to see how the Court arrived at its conclusion. It does not "follow," as the Court suggests in *Wong Sun v. United States,*[24] that "from our holding in *Silverman v. United States* that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of papers and effects."

The reason that the evidence in the *Silverman* case was excluded, as Justice Black suggests,[25] is because of the exclusion-

[21] 316 U.S. 129 (1942).
[22] 365 U.S. 505 (1961).
[23] 389 U.S. at 353, *quoting* Silverman v. United States, 365 U.S. 505 (1961).
[24] 371 U.S. 471, 485 (1963).
[25] 389 U.S. at 369 (Black, J., dissenting).

ary rule formulated in *Weeks v. United States.*[26] According to Justice Black, the Court has adopted an exclusionary rule to bar evidence obtained by means of an unauthorized intrusion regardless of whether there was a search or seizure in violation of the fourth amendment. "This exclusionary rule . . . rests on the 'supervisory power' of this Court over Federal Courts and is not rooted in the Fourth Amendment."[27] Another case relied on by the majority is *Warden v. Haydon.*[28] This case is cited to show that the fourth amendment is not limited to searches and seizures of tangible property but also covers intangibles as well. That interpretation is supposed to be gleaned from the statement: "The premise that property interests control the right of the government to search and seize has been discredited."[29] *Warden v. Haydon,* however, was a case dealing not with intangibles such as conversations but with the seizure of clothes—tangible property. The "property interests" related not to an issue of tangible or intangible items but dealt with the common law rule that the right of seizure depended upon proof of a superior property interest and is inapplicable here.

Although the Court clearly states that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy'," [30] that appears to be exactly what the Court is trying to do. For years the Supreme Court or its individual members have equated the fourth amendment with a right to privacy. This can be seen in early cases such as *Boyd v. United States,*[31] later in *Weeks v. United States,*[32] and in Mr.

[26] 232 U.S. 383 (1914).
[27] 389 U.S. at 369 (Black, J., dissenting). *See also* Wolf v. Colorado 338 U.S. 25, 39 (1949) (concurring opinion); Mapp v. Ohio, 367 U.S. 643, 661 (1961) (concurring opinion).
[28] 387 U.S. 294 (1967).
[29] *Id.* at 304.
[30] 389 U.S. at 350.
[31] 116 U.S. 616 (1885).
[32] 232 U.S. 383 (1914).

Justice Brandeis' oft quoted dissent in the *Olmstead* case where he goes so far as to say that "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."[33] The basis for the recent *Berger v. New York*[34] decision was that the fourth amendment "right to privacy" had been violated.

It is this growing tendency to equate the fourth amendment with a right to privacy protection that is the real basis for the *Katz* decision and has given the fourth amendment a new interpretation that it was never meant to have and never should have had.

> The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches of "persons, houses, papers and effects". No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.[35]

The function of the Supreme Court is to interpret the Constitution, not to rewrite it. The Constitution has left the job of making laws to Congress. The Supreme Court first declared evidence obtained by an electronic device inadmissable in federal courts in *Nardone v. United States*,[36] a wiretapping case. This case, however, was not decided on constitutional grounds but on a statute, the Federal Communication Act of

[33] 277 U.S. at 478 (Brandeis, J., dissenting).

[34] 388 U.S. 41 (1967).

[35] 389 U.S. at 374 (Black, J., dissenting).

[36] 302 U.S. 379 (1937).