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Supreme Court Decisions: It's Alright Ma (Bell)

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Faith and Credit Clause makes enforceable the judgment of one state in all others. Once a court of competent jurisdiction in one state has determined that a defendant is the debtor of a plaintiff, it will allow an action on the debt in other states where the defendant has property, even if the latter wouldn't originally have had jurisdiction to determine the debt.

A number of reasons why contacts with a state can support a finding of jurisdiction are given by the Court. A defendant's claim to property located in a state would normally indicate an expected benefit from the state's protection of that property. A state has an interest in assuring the marketability of property within its borders as well as in providing a procedure for peaceful resolution of disputes about possession of the property. Also, there is the likelihood that important records and witnesses will be found in the state where the property is located. The Court notes, however, that while these and other factors may affect a decision as to jurisdiction, none is necessarily decisive.



It's Alright Ma (Bell)

by Andrew S. Katz

With a proper order from a United States District Court, federal law enforcement officials may now compel your local telephone company to provide facilities and technical assistance in support of electronic surveillance operations authorized by warrant. In the decision of *United States v. New York Telephone Company*, 46 U.S.L.W. 4033 (Dec. 6, 1977), the

United States Supreme Court upheld an order of the U.S. District Court for the Southern District of New York authorizing agents of the Federal Bureau of Investigation to install pen registers (a device that records the numbers dialed on a telephone) and directing the New York Telephone Company to provide the FBI with the information and facilities necessary to employ the pen registers covertly during the investigation of an illegal gambling operation.

The District Court issued the order on the basis of an FBI affidavit stating that there was probable cause to believe that two telephones in Manhattan were being used in furtherance of illegal gambling activity. The Company refused fully to comply with the court order, locating the lines that were of interest but refusing to lease to the FBI unused lines needed to operate their equipment without notice. Although the FBI was authorized to compensate the Company for its assistance, the agents were advised to string their own cables to the suspects' apartment, a task impossible to accomplish without alerting the suspects. The Company moved in the District Court to vacate that part of the order directing it to furnish facilities and technical assistance to the FBI on the ground that the order could only be issued in connection with a wiretap order meeting the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. It denied that the District Court possessed authority to give the order under either Fed. Rule Crim. Proc. 41 or the All Writs Act, 28 U.S.C. § 1651(a). The District Court held that pen registers are not governed by Title III because they do not intercept oral communication, they only record phone numbers. It claimed jurisdiction to issue the order upon a showing of probable cause relying upon the authority of the All Writs Act and its "inherent powers" to direct the Company to assist the FBI.

In *Application of the United States of America in the Matter of an Order Authorizing the Use of a Pen Register or Similar Mechanical Device*, 538 F.2d 956 (2d. Cir. 1976), the Court of Appeals agreed with the District Court on the

scope of Title III and the power to authorize pen register surveillance under Fed. Rule Crim. Proc. 41. However, the majority also held that "in the absence of specific and properly limited Congressional action, it was an abuse of discretion for the District Court to order the Telephone Company to furnish technical assistance." 538 F. 2d at 961. The Court of Appeals warned that "such an order could establish a most undesirable, if not dangerous and unwise, precedent for the authority of the federal courts to impress unwilling aid on private third parties" and that "there is no assurance that the court will always be able to protect (third parties) from excessive or overzealous Government activity or compulsion." 538 F. 2d at 962-963. The District Court's order against the Company was invalidated and a petition for certiorari was granted by the Supreme Court.

Justice White's majority opinion (joined in by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist) reviews the language and legislative history of Title III and concludes that pen registers are not within the scope of its requirements. Title III is concerned with the *interception* of wire or oral communication, "intercept meaning 'the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.' 18 U.S.C. § 2510(4). Pen registers do not acquire the 'contents' of communications. . . ." 46 U.S.L.W. at 4035. Therefore, reasons the majority, the District Court had authority to direct the Company to provide assistance to the FBI although the pen register order was not in conformity with Title III.

By holding that the District Court had power to authorize the installation of the pen registers, the majority expands the meaning of search and seizure under Fed. Rule Crim. Proc. 41 to include a "search" to discover the use a telephone is being put to when there is a suspicion of its involvement in a criminal venture. Rule 41 authorizes warrants for seizures of *property* or *contraband* and "property" is defined to include *documents, books, papers* and any other *tangible objects*. The opinion states that "it does not

restrict or purport to exhaustively enumerate all the items which may be seized pursuant to Rule 41." 46 U.S.L.W. at 4036. The majority's belief that Rule 41 encompasses authorization for seizures of such intangibles as dial impulses made by a telephone is based in part on the view of Congress, as shown by debate over Title III, that pen registers pose a lesser threat to privacy than interception of oral communications. Further support for the District Court's authority was found in Fed. Rule Crim. Proc. 57(b) which provides "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

The majority opinion rejected the Court of Appeals' position that the order compelling the Company to provide assistance constituted an abuse of discretion, concluding "that the order issued here against respondent was clearly authorized by the All Writs Act and was consistent with the intent of Congress." 46 U.S.L.W. at 4037. The All Writs Act provides:

"The Supreme Court and all courts established by Act of Congress may issue all Writs necessary or appropriate in aid

of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a).

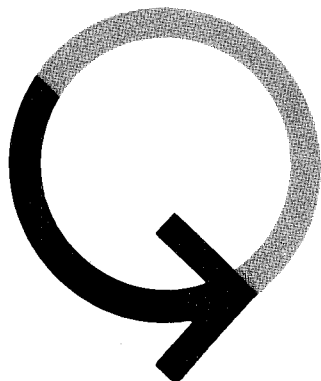
The District Court was found to have the power under the All Writs Act to issue any commands needed to prevent frustration of orders it had previously issued. Furthermore, the majority extends the power to third persons, who although uninvolved in the original controversy, are capable of frustrating the implementation of a court order. Examining the facts of the case the majority concludes, "... We do not think that the Company was a third party so far removed from the underlying controversy that its assistance could not be permissibly compelled." 46 U.S.L.W. at 4037. Characterizing the Telephone Company as "a highly regulated public utility with a duty to serve the public," the majority found that the Company's duty extended to providing technical assistance when there was probable cause to believe the Company's facilities were being used to aid a criminal venture.

Finally, the majority reviewed a 1970 amendment to Title III, 18 U.S.C. 2518(4), that requires a communication common carrier to furnish any assistance necessary to carry-out an electronic interception. The majority reasoned that if

Congress has made provision for compelling the assistance of phone companies for the conduct of electronic interception of oral communication, "it would be remarkable if Congress thought it beyond the power of the federal courts to exercise, where required a discretionary authority to order telephone companies to assist in the installation and operation of pen registers, which accomplish a far lesser invasion of privacy." 46 U.S.L.W. at 4038.

In his dissent, Justice Stevens (joined by Justices Brennan, Marshall, and in part by Justice Stewart) admonished the majority for ignoring the principal of limited federal jurisdiction. This principal, he states is "never . . . more important than when a federal court purports to authorize and implement the secret invasion of an individual's privacy." 46 U.S.L.W. at 4038. The dissent emphasized that Congress has neither given the district court a direct mandate to issue pen register intercept orders nor has it directed the courts to require private parties to provide assistance in execution of its orders. Without a clear authorization from Congress, the dissent notes, "the federal courts should not presume the existence of jurisdiction to act; which is precisely what the majority has done in reaching its decision.

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