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Case Comment

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CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—FOURTH AMENDMENT—ELECTRONIC EAVESDROPPING—GOVERNMENT AGENTS MAY EQUIP THEIR INFORMERS WITH ELECTRONIC TRANSMISSION DEVICES WITHOUT OBTAINING A SEARCH WARRANT, FOR SUCH CONDUCT DOES NOT INVADE AN INDIVIDUAL'S "JUSTIFIABLE" EXPECTATIONS OF PRIVACY AND THUS DOES NOT CONSTITUTE A VIOLATION OF THE FOURTH AMENDMENT.—Harvey Jackson, a police informer, met and transacted business with James White eight times during the thirty-day period from December 9, 1965, to January 7, 1966. These meetings took place at several locations, including the defendant's home and place of business as well as the informer's home and automobile.[1] Unfortunately for White, whose business was selling narcotics, his client Jackson had a kel transmitter concealed on his person at each one of their meetings. By means of this transmitting device, all eight of the accompanying conversations were overheard by narcotics agents stationed nearby. At no time during the thirty days did the government attempt to secure a search warrant.

Harvey Jackson did not testify at White's trial and White was convicted of multiple narcotics offenses,[2] largely upon the testimony of the narcotics agents who had overheard his incriminating statements via the concealed transmitter. He was sentenced as a second offender[3] to twenty-five years' imprisonment and also fined a total of $35,000.[4]

A three-judge panel of the Court of Appeals for the Seventh Circuit reversed the conviction. Subsequently, the government petitioned for and received a rehearing *en banc*.[5] On this petition, the entire court, with three judges in dissent, concluded that the defendant's fourth amendment rights[6] had been violated when the government narcotics agents electronically intercepted his private conversations.[7] The United States Supreme Court granted certiorari, reversed and *held*: the fourth amendment's protection against unreasonable searches and seizures does not extend to an individual when he speaks to a colleague who is secretly wired to relay their every word to the ears of government agents, for an individual has no "justifiable" expectation of privacy in such a conversation. *United States v. White,* 401 U.S. 745 (1971).

At common law, evidence which met the test of relevancy was admissible

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1 United States v. White, 401 U.S. 745 (1971).

2 26 U.S.C. § 4705(a) (1967), *repealed,* Pub. L. No. 91-513 § 1101(b)(3)(A), 84 Stat. 1292 (1970). Present authority is based on 21 U.S.C. § 828(a) (Supp., 1971); 21 U.S.C. § 174, *repealed,* Pub. L. No. 91-513 § 1101(a)(2), 84 Stat. 1291 (1970). Present authority is based on 21 U.S.C. § 960 (Supp., 1971).

3 Defendant was convicted of selling narcotics in Illinois in 1955.

4 Brief for Petitioner at 3, United States v. White, 401 U.S. 745 (1971).

5 *Id.* at 8.

6 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 person or things to be seized. U.S. CONST. AMEND. IV.

7 United States v. White, 405 F.2d 838, 848 (1969).

even if it was obtained by illegal or fraudulent means.[8] This doctrine was never seriously challenged until the United States Supreme Court decided in *Weeks v. United States*[9] that evidence obtained by government agents in violation of the fourth amendment could not be used in federal courts.[10] This exclusionary rule was applied to the state courts in 1961 in *Mapp v. Ohio*.[11] By these two landmark decisions, then, the common law rule of complete admissibility has been narrowed to exclude evidence obtained in violation of an individual's fourth amendment rights; it, however, has never been narrowed to exclude evidence obtained by mere fraud or trickery.[12]

Traditionally, fourth amendment rights and protections were evaluated on the basis of the "trespass" doctrine enunciated in *Olmstead v. United States*.[13] In *Olmstead,* the Supreme Court found that evidence obtained by federal agents from a wiretap of an individual's phone did not violate the individual's fourth amendment rights, since no physical "trespass" onto the individual's property was accomplished to effect the monitoring.[14] The criterion delineated to determine future violations of fourth amendment protections was a simple one—was there a physical invasion of the individual's premises by government agents? If so, then the evidence thus obtained would be inadmissible at trial, if not, no constitutional bar to the evidence existed.

Going beyond the "trespass" rationale, the Court stated a second and independent ground for its holding—one which may be called the "tangible objects" doctrine. The fourth amendment ensures "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ."[15] Since the things enumerated in the fourth amendment encompass only things of a physical nature, it was early thought and held in *Olmstead,* that only tangible objects, and not mere intangibles such as words, were protected from "seizure."[16] This initial eavesdropping decision, then, was based on two premises. First, since there was no "trespass" onto defendant's property, there was no "search" involved. And, second, since there was nothing but words taken, there was no "seizure," for a seizure can only be effected on tangible items.[17]

Although providing extremely simple theories for the evaluation of fourth amendment concepts, the "trespass" and "tangible objects" doctrines provided no real protection to an individual in an age which witnessed Orwellian strides in

8 Olmstead v. United States, 277 U.S. 438, 467 (1928); 4 B. JONES, THE LAW OF EVIDENCE, CIVIL AND CRIMINAL § 868 (5th ed. 1958); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 137 (1954); E. MORGAN, BASIC PROBLEMS OF EVIDENCE 234 (1962); 8 J. WIGMORE, EVIDENCE § 2183 (McNaughton Rev. 1961).

9 232 U.S. 383 (1914).

10 *Id.* at 398.

11 367 U.S. 643 (1961).

12 It has, however, been narrowed to exclude evidence obtained by trickery which also involves a violation of the Bill of Rights. *See, e.g.,* Massiah v. United States, 377 U.S. 201 (1964).

13 277 U.S. 438 (1928).

14 *Id.* at 466.

15 U.S. CONST. AMEND. IV. See the text of this amendment reproduced in note 6 *supra.*

16 277 U.S. at 464.

17 *Id.*

the development of electronic transmission devices.[18] It must have provided little consolation to an individual to know that the walls of his home protected every scrap of paper inside from "seizure" under the fourth amendment, but failed to afford an equal protection to words uttered within the same walls. Nevertheless, the Court affirmed the *Olmstead* rationale in 1942 in *Goldman v. United States,*[19] and again in 1952 in *On Lee v. United States.*[20] In the former case, federal agents placed a detectaphone against the wall of Goldman's private office and thus intercepted his private conversations. No fourth amendment violation was found, since no trespassory intrusion was committed on defendant's premises.[21] In the latter case, which involved facts virtually identical to those of the instant case, the Court for the first time ruled on the constitutionality of bugged-agent surveillance. Chin Poy, a government informer, entered On Lee's laundry and engaged him in a conversation involving illegal sales of narcotics. In the course of this conversation On Lee made several incriminating statements. Unknown to On Lee, Chin Poy had a radio transmitter concealed on his person which relayed the conversation outside the laundry to a federal agent. Chin Poy did not testify at the trial and On Lee was convicted largely on the testimony of the federal agent who had intercepted his incriminating statements. The Court once again bolstered the dual rationale of *Olmstead* by holding: first, since there was no trespass onto On Lee's premises, there was no "search";[22] and second, since words are not tangibles, they are not capable of "seizure" within the meaning of the fourth amendment.[23]

The first divergence by the Supreme Court from the underpinnings of *Olmstead* came implicitly in *Silverman v. United States,*[24] and explicitly in *Wong Sun v. United States.*[25] In *Wong Sun* the "tangible objects" doctrine was specifically repudiated and words were brought within the purview of the fourth amendment. The Court in *Wong Sun* said:

> It follows from our holding in *Silverman v. United States,* 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the traditional seizure of papers and effects.[26]

The death of the "tangible objects" doctrine marked the commencement of a trend toward providing greater protection from electronic "snooping," and while both *Silverman* and *Wong Sun* were ultimately decided on the existence of a

18 For a detailed analysis of the development of such devices and the chilling threat they pose to an individual's privacy, see S. DASH, R. SCHWARTZ, & R. KNOWLTON, THE EAVESDROPPERS 305-81 (1959); M. SLOUGH, PRIVACY, FREEDOM AND RESPONSIBILITY 247-74 (1969); A. WESTIN, PRIVACY AND FREEDOM 67-168 (1966).

19 316 U.S. 129 (1942).

20 343 U.S. 747 (1952).

21 316 U.S. at 134-35.

22 343 U.S. at 751-53.

23 *Id.* at 753.

24 365 U.S. 505 (1961). In *Silverman,* a "spike mike" was inserted into a heating duct in defendant's home to enable government agents to secretly audit his conversations. The Court held that the government agents could not relate what they heard by such conduct since the physical penetration of the "spike mike" into defendant's premises was sufficient to constitute a violation of the fourth amendment under the "trespass" test.

25 371 U.S. 471 (1963).

26 *Id.* at 485.

physical "trespass," there were seeds existent in *Silverman* that were to ripen into the complete overthrow of the "trespass" doctrine.

Although recognizing the existence of a physical invasion in *Silverman,* and the lack thereof in earlier cases,[27] the Court altered the physical invasion concept significantly:

> . . . decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an *actual intrusion* into a constitutionally protected area.[28]

The requirement of a "*physical* intrusion" as laid down in *Olmstead,* was thus replaced by the more practical "*actual* intrusion" standard of *Silverman.*

Using *Silverman* as a touchstone, the Court in *Katz v. United States*[29] perfected the ultimate demise of the "physical intrusion" requirement and placed in its void an "actual intrusion" test. In *Katz,* FBI agents installed listening and recording devices outside a phone booth used by the defendant to relay wagering information. Defendant's ends of telephone conversations were recorded by these devices, without prior judicial approval, and introduced at trial. Recognizing "that the reach of [the fourth] [a]mendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure,"[30] the Court stated that the fourth amendment is devised to protect privacy against the "uninvited ear" of governmental intrusion and must be applied to protect people, not places.[31] The absence of a physical penetration into the wall of the phone booth was found to be of no "constitutional significance." The Court ruled that it was the actual intrusion of the "privacy upon which [Katz] justifiably relied while using the telephone booth . . ."[32] that was sufficient to constitute a violation of the fourth amendment, and to thus mandate a reversal of his conviction.

With the "trespass" requirement of *Olmstead* and *Goldman* thus laid to rest, a more meaningful fourth amendment protection was erected—one that recognized the mounting seriousness of the electronic assault on privacy and one that phrased its protection in personal terms of "privacy" and "justifiable reliance" rather than property concepts of "trespass" and "intrusion."

By failing to discuss, or even cite, *On Lee,* the majority in *Katz* left to the imagination of the United States Courts of Appeals the question of the continuing validity of that first bugged agent decision.[33] The majority in *Katz,* however, did mention two other bugged agent cases—*Lopez v. United States*[34] and *Osborn v. United States.*[35] In *Lopez,* the Court held that there was no violation of the

27 See cases listed at 365 U.S. at 510-11.
28 *Id.* at 512 (emphasis added).
29 389 U.S. 347 (1967).
30 *Id.* at 353.
31 *Id.* at 352-53.
32 *Id.* at 353.
33 Accordingly, the various circuits of the United States Court of Appeals were divided on the proper effect of *Katz* on the Court's earlier decision in *On Lee.* Some held that *Katz* did not adversely affect the rationale of *On Lee. See, e.g.,* United States v. De Lutro, 435 F.2d 255 (2d Cir. 1970); Koran v. United States, 408 F.2d 1321 (5th Cir. 1969); Dancy v. United States, 390 F.2d 370 (5th Cir. 1968). *But see* United States v. White, 405 F.2d 838 (7th Cir. 1969); United States v. Waller, 422 F.2d 1202 (7th Cir. 1969).
34 373 U.S. 427 (1963).
35 385 U.S. 323 (1966).

fourth amendment where an internal revenue agent recorded an attempted bribe on a recorder concealed on his person, after being invited into the defendant's office. Such conduct the Court found did not amount to "eavesdropping" since the agent participated in the conversation and could have heard it without the aid of the recording device.[36] Likewise, in *Osborn,* a government agent concealed a recorder on his person and recorded attempts by Osborn to persuade the agent to bribe prospective jurors. Prior to using the recorder, the government agent swore out an affidavit which was presented to two federal district court judges who authorized the recording. Holding that such conduct did not violate Osborn's fourth amendment rights, the Court quoted with approval from Mr. Justice Brennan's dissenting opinion in *Lopez*:

> There could hardly be a clearer example of "the procedure of antecedent justification before a magistrate that is central to the Fourth Amendment" as a precondition of electronic surveillance.[37]

Far from providing a panacea for all fourth amendment problems, *Katz* left unanswered the critical question presented in the instant case, *i.e.,* does the transmission of a conversation between an individual and a consenting informer constitute a violation of the fourth amendment under the privacy test announced in *Katz*?

Adversely confronted by the Court's decision in *On Lee,* defendant White, basing his argument on the erosion of the "trespass" doctrine and the intercession of *Katz,* attempted unsuccessfully to overturn that first bugged-agent decision. Contending that "the surreptitious placing of the kel set on informer Jackson was for all conceptual purposes the same as the surreptitious wiring of the telephone booth in *Katz,*"[38] White sought to establish that his justifiable expectation of privacy, and thus his fourth amendment rights, was invaded when his private conversations were transmitted to the "uninvited ears" of the government agents. The Court, while reaffirming its prior holdings that a nontrespassory intrusion can constitute a fourth amendment violation,[39] and that verbal as well as tangible evidence may be illegally seized,[40] rejected White's claim. While conceding that "individual defendants" expect their criminal plottings to go no further than the ears of their confidants, the Supreme Court denounced the idea that such expectations are "justifiable" when one of those confidants agrees to work with the Government to expose the plot.[41] The crux of the controversy encountered in *White* revolves around divergent interpretations of the risk one person assumes when he speaks to another.

In order to understand fully the "assumption of risk" controversy, it is necessary to mention two prior Supreme Court decisions, each dealing with the use of government informers. In the first case, *Lewis v. United States,*[42] an

36 373 U.S. at 451-52.
37 385 U.S. at 330.
38 Brief for Respondent at 12, United States v. White, 401 U.S. 745 (1971).
39 401 U.S. at 747.
40 *Id.* at 748.
41 *Id.* at 749.
42 385 U.S. 206 (1966).

undercover federal narcotics agent entered the defendant's home and consummated an illegal sale of narcotics. In the second case, *Hoffa v. United States,*[43] a government informer frequented the defendant's hotel suite, and was continually in the defendant's company. In both cases the Supreme Court upheld the use of verbal testimony given by the government informers who, while concealing their identity, had audited incriminating statements concerning the criminal behavior of both men. In *Lewis,* the Court held that the fourth amendment is not violated when a government agent enters a defendant's home pursuant to an invitation and neither sees nor hears anything unrelated to the purpose of his visit or not contemplated by the defendant.[44] In *Hoffa,* the Court found that a defendant has no valid objection under the fourth amendment when he relies on his "misplaced confidence" that the person to whom he speaks will not reveal his wrongdoing.[45] Another way of stating this rationale is that an individual assumes the risk or impliedly consents to the possibility of a confidant's repetition of a conversation. To defendant White, then, the *Hoffa* rule meant only that informer Jackson, if he had been available, could have testified to the substance of White's words. The critical question was whether the government agents to whom Jackson transmitted the words were permitted to testify regarding them, or whether such testimony was barred by the fourth amendment.

Quoting with approval from *On Lee,* the plurality differentiated "eavesdropping on a conversation, with the connivance of one of the parties . . ."[46] from the nonparticipant monitoring in *Katz,* and by applying a trilogy of cases—*Lopez, Lewis,* and *Hoffa*—assimilated bugged-agent surveillance into the "misplaced confidence" mold. The Court said:

> So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by *Hoffa* and *Lewis.* If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. See *Lopez* v. *United States,* 373 U.S. 427 (1963).[47]

Stripped to its essentials, the reasoning of the plurality may be simply stated: if an informer can repeat verbally what is relayed to him by a defendant (as in *Lewis* and *Hoffa*) or record and later divulge it (as in *Lopez*), what difference does it make if the informer cooperates with the police and instantaneously transmits the conversation to ears uninvited by the defendant?[48] This reasoning seeks to equate the risks taken by the defendants in *Lewis, Hoffa,* and *Lopez* with those involved in *White.* In the words of Mr. Justice White, speaking for the plurality:

43 385 U.S. 293 (1966).
44 385 U.S. at 211.
45 385 U.S. at 302-03.
46 401 U.S. at 749-50.
47 *Id.* at 752.
48 *Id.* at 785 (Harlan, J., dissenting).

> If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks . . . if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other.[49]

Such an analysis clearly ignores important factual distinctions among the trilogy and the instant case. It is true that in *Lewis, Hoffa,* and *Lopez,* as in *White,* a government agent obtained incriminating statements from a suspect while concealing his true identity, but there are major factual distinctions that make these decisions legally and logically inapposite to support the instant result. As pointed out by Mr. Justice Harlan in a spirited dissent, "In each of these cases the risk the general populace faced was different from that surfaced by the instant case. No surreptitious third ear was present, and in each opinion that fact was carefully noted."[50]

In *Lewis,* for example, an undercover federal narcotics agent purchased marijuana at the defendant's home on two separate occasions. Mr. Chief Justice Warren, speaking for the majority found no violation of the fourth amendment, noting that the government's conduct in *Lewis* was different from that in *Silverman,* for "there the conduct proscribed was that of eavesdroppers, unknown and unwanted intruders who furtively listened to conversations occurring in the privacy of a house."[51] Although the Court in *Hoffa* held, as it did in *Lewis,* that the informant was a competent witness to conversations with the defendant, the Court specifically stated that the informant was not a "surreptitious eavesdropper."[52] Likewise, in *Lopez* the Court was careful to point out that the case involved "no 'eavesdropping' whatever in any proper sense of that term,"[53] since the informer merely recorded and did not transmit the defendant's words.

To equate, as the plurality did in this case, the risks involved in *Lewis, Hoffa,* and *Lopez* with that involved in *White* is to ignore the true purport of those first three cases, and to contradict the dictates of good common sense. As the risk of betrayal rises, so proportionately rise the precautions an individual will take to avoid such a consequence. But there is no precaution short of sealing one's lips that will ensure against electronic transmission. The risk added by bugged-agent surveillance is that what could have been related to another "selectively, inaccurately, after the fact, and supported only by the word of the relator, will now be related in its entirety, accurately, . . ."[54] and simultaneously. Such a high degree of risk was absent from *Lewis, Hoffa,* and *Lopez. Lewis* and

49 *Id.* at 751.
50 *Id.* at 784 (Harlan, J., dissenting).
51 385 U.S. at 212.
52 385 U.S. at 302.
53 373 U.S. at 439.
54 Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation,* 68 COL. L. REV. 189, 218-19 (1968).

Hoffa determined that a defendant must assume the risk of verbal repetition, while *Lopez* established that recording without a warrant was constitutionally justifiable since the informer was a party to the conversation and could have heard it without the aid of the recorder. Such was not the case in *White*. There the government agents, whose "uninvited ears" were afforded access to the conversation via the bugged agent, amounted to no less than "surreptitious eavesdroppers." Mr. Justice Brennan recognized the greater risks posed by electronic surveillance in his dissenting opinion in *Lopez*:

> The risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak. But as soon as electronic surveillance comes into play, the risk changes crucially. There is no security from that kind of eavesdropping, no way of mitigating the risk, and so not even a residuum of true privacy (citation omitted).
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> . . . Electronic aids add a wholly new dimension to eavesdropping. They make it more penetrating, more indiscriminate, more truly obnoxious to a free society. Electronic surveillance, in fact, makes the police omniscient; and police omniscience is one of the most effective tools of tyranny.[55]

The plurality, while relying on prior cases to bolster the instant result, goes far beyond the pale of legal precedent and delves deeply into the philosophical basis of our society. By structuring its analysis in terms of the "privacy expectations of particular defendants,"[56] and the "defendant's constitutionally justifiable expectations,"[57] or the risks confronting "wrongdoers"[58] or those "contemplating illegal activities,"[59] the Court fails to recognize the precise import of its holding. This revitalization of *On Lee* affects not only "defendants" and "wrongdoers," but exposes the general citizenry to the risks inherent in bugged-agent surveillance.

The critical question presented by the instant case is not as the plurality views it, what risks an individual must assume when he speaks to another, but rather what risks of governmental invasion ought an individual be required to endure in a free society. The latter question involves much more than a factual analysis to determine whether an individual has or has not assumed a certain risk, it goes much deeper and strikes at the very jugular vein of our democracy. The Court's argument, that an individual must assume the risk of the trustworthiness of every person in whom he confides,[60] is conclusory when applied to government action, for we must assume only those risks of intrusive government behavior which the Court imposes on us. The risk of nonparticipant eavesdropping and forcible searches is minimal simply because the Court has decided to closely regulate the instances in which such conduct will be tolerated. The decision by the Court, here, to impose the risk of bugged-agent surveillance on the citizenry is at best an unfortunate one, for if bugged-agent surveillance were to

55 373 U.S. at 465-66.
56 401 U.S. at 751.
57 *Id.*
58 *Id.* at 752.
59 *Id.*
60 *Id.*

become a prevalent practice then its ultimate effect would be to "undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society."[61]

In brief opinions Justices Brennan[62] and Marshall[63] asserted that they would condone the government activity in *White* only if the safeguards of the fourth amendment's warrant requirement were complied with. In lengthy dissents, Justices Douglas[64] and Harlan,[65] while concurring with Justices Brennan and Marshall on the need for prior judicial approval, penned classic espousals of an individual's right to privacy as protected by the fourth amendment. A contrary decision in *White,* then, would not have removed the use of bugged informers from the government's arsenal of anticriminal weaponry—it would merely have restricted their use to those situations where the government first presented the probable cause issue to a detached magistrate. As it stands now, the only restriction placed on their use is that before employing such a technique the government must first find a "willing assistant." Such is hardly the restriction the Founding Fathers had in mind when they structured the warrant requirement to act as a buffer between the citizen's right to be let alone and the government's right to seek out and punish criminal behavior.

All four of these Justices—Brennan, Marshall, Douglas, and Harlan—while decrying the infringement of personal privacy committed in *White,* raised no objection to the government's conduct in *Hoffa.* Yet the threat created by the government's conduct in the latter case poses a far greater threat to our free society than that approved by the plurality in the instant opinion. For in *Hoffa,* the informer, who was a friend of the defendant's, penetrated the defendant's inner sanctum of confidants for long periods of time by playing on their friendship. At the time of this activity, defendant Hoffa was being tried for a violation of the Taft-Hartley Act, and the informer's mission was "to be on the lookout"[66] for any signs of jury tampering. The use to which the friend-informer was put in *Hoffa* differed substantially, then, from the use of the informer in *White.* For in *White* the informer's mission was to gather evidence of an existing crime, whereas in *Hoffa* the purpose of the friend's infiltration was to see "if crimes in the future would be committed."[67] By approving of the unbridled use of friends and associates to ferret out "future" crime, but flinching at an informer's use of a radio transmitter, Justices Douglas, Harlan, Brennan, and Marshall have, as

61 *Id.* at 787 (Harlan, J., dissenting).
62 *Id.* at 755 (Brennan, J., concurring).
Justice Brennan agreed with the dissenters — Justices Douglas, Harlan, and Marshall — that the fourth amendment imposes a warrant requirement in cases involving bugged-agent surveillance, but felt compelled by the rationale of *Desist v. United States,* 394 U.S. 244 (1969), to cast his vote with the majority.
In *Desist,* the Court determined that its decision in *Katz* applied only to those electronic surveillances that occurred after the date of the *Katz* decision — December 18, 1967. Since the surveillance here occurred in 1965 and 1966, the majority reasoned that the court of appeals erred in retroactively applying the principles announced in *Katz* to the instant case.
63 401 U.S. at 795 (Marshall, J., dissenting).
64 *Id.* at 756 (Douglas, J., dissenting).
65 *Id.* at 768 (Harlan, J., dissenting).
66 385 U.S. at 298.
67 *Id.* at 321 (Warren, C. J., dissenting).

one commentator has astutely observed, "swallowed the pig and choked on its tail."[68]

At best, the atmosphere created by *Hoffa* and the instant decision is less than conducive to sustain the growth and foster the development of those freedoms which distinguish our society from those more repressive. And while possibly providing a workable standard for Oceania in *1984*, such a standard is much less acceptable for the United States of America in 1971 and the years thereafter.

—*Joseph C. Murray*

68 Lewin, *Privacy and the "Third-Party Bug,"* THE NEW REPUBLIC, April 17, 1971, at 17.