William & Mary Law Review

Volume 9 (1967-1968)
Issue 4

Article 18

May 1968

Criminal Law and Procedure - Electronic Eavesdropping - Katz v. United States, 88 S. Ct. 507 (1967)

quantitative concept.[26] What may appear too vague as to one subject may be definite as to another.[27] To the minds of some courts, the criticized statutory word or phrase has a well-recognized or common meaning.[28] It also may be determined that the challenged portion has a definite and well-settled meaning in the common law.[29] In the light of the fact that the more recent decisions have held "vagrancy" statutes unconstitutional, and with the Supreme Court giving greater force and effect to concepts of equal justice,[30] it is probable that courts in the future will look more rigorously at these statutes in determining their constitutionality. However, the Supreme Court has yet to decide the validity of "vagrancy" statutes.[31] Until such a case is decided, the courts are relatively free to construe these statutes with their own notions of "vagueness" and "indefinitiveness."

Criminal Law and Procedure—ELECTRONIC EAVESDROPPING. In *Katz v. United States*,[1] petitioner was charged with transmitting wagering information by telephone in violation of a federal statute.[2] Over

26. Winters v. New York, 333 U.S. 507, 524 (1948) (dissenting opinion).

27. *Id.*, at 525.

28. *Id.*; Phillips v. Municipal Ct., 24 Cal. App. 2d 453, 75 P.2d 548 (1938); State v. Harlowe, 174 Wash. 227, 24 P.2d 601 (1933); McNeilly v. State, 119 N.J.L. 237, 195 A. 725 (Sup. Ct. 1937); *See* People v. Bell, 204 Misc. 71, 74, 125 N.Y.S.2d 117, 119 (Nassau County Ct.), *aff'd*, 306 N.Y. 110, 115 N.E.2d 821 (1953); People v. Sohn, 269 N.Y. 330, 333, 199 N.E. 501, 502 (1936); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); *contra*, United States v. Margeson, 259 F. Supp. 256 (1966), where the court stated, in discussing the meaning of "good account," that "the New Jersey courts have not defined it, and we must confess that to us it is insufficiently precise to pass muster under the 14th Amendment." *Contra*, People v. Diaz, 4 N.Y.2d 469, 151 N.E.2d 871 (3rd Cir. 1958), where the court felt that while the word "loiter" had acquired a common and accepted meaning, it did not, by itself, inform a citizen of its criminal application and was left open to arbitrary enforcement.

29. Connally v. General Const. Co., 269 U.S. 385 (1926); *contra*, Winters v. New York, 333 U.S. 507, 519 (1948).

30. For a discussion of the dangers of disorderly conduct statutes vis-à-vis our changing social times, *see* Watts, *Disorderly Conduct Statutes in Our Changing Society*, 9 W. & M. L. REV. 349 (1967).

31. Hicks v. District of Columbia, 197 A.2d 154 (D.C. Cir. 1964), *cert. denied*, 383 U.S. 252 (1966).

1. 88 S. Ct. 507 (1967).

2. 18 U.S.C. § 1084 (Supp. III, 1958). That 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 or information assisting in the

his objection the Government was allowed to introduce evidence of the petitioner's end of telephone conversations overheard by FBI agents as they monitored an electronic listening and recording device attached to the outside of the public telephone booth from which the petitioner had placed his calls.[3]

In reversing the conviction, the Supreme Court held that since the surveillance in question had not received the antecedent justification of a duly authorized magistrate,[4] this "search and seizure" [5] on the part of the FBI was unreasonable and therefore a violation of the petitioner's rights under the Fourth Amendment.[6]

The first case to reach the Supreme Court involving the Fourth Amendment's applicability to eavesdropping through a wiretap was *Olmstead v. United States*,[7] in which Olmstead and others were convicted of conspiring to violate the National Prohibition Act. Evidence essential to their conviction had been obtained by wiretap of private telephones, and on this basis Olmstead contended that his right under the Fourth Amendment had been violated. The Court rejected this contention on three grounds: first, that the Fourth Amendment protected persons against the search and seizure of tangibles but not intangibles

---

placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recepient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

3. Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966).

4. *See,* Osborn v. United States, 385 U.S. 323, 330 (1966); Berger v. New York, 388 U.S. 41, 51 (1961).

5. The Supreme Court has held that intangibles such as oral statements can be "searched and seized" within the meaning of the Fourth Amendment. Irvine v. California, 347 U.S. 128 (1954) (dictum); Silverman v. United States, 365 U.S. 505, 511 (1961); Wong Sun v. United States, 371 U.S. 471, 485 (1963); Berger v. New York, 388 U.S. 41, 51 (1966); Warden v. Hayden, 387 U.S. 294, 304 (1967).

6. U.S. CONST. amend. IV. "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."

7. 277 U.S. 438 (1928).

such as conversation; second, that the Fourth Amendment applies only to physical trespass; and third, that Olmstead intended that his conversation be projected outside the privacy of his home.[8] Further development of constitutional law regarding eavesdropping was retarded by the enactment of the Federal Comunications Act[9] and the Court's interpretation of section 605 of this law to bar further wiretapping by federal agents.[10] It was not, therefore, until the development of electronic listening and recording devices that the question was raised once more.[11]

Although subsequent decisions involving the use of electronic eavesdropping devices have been based on *Olmstead*, ironically they have tended to erode its holding. The first *Olmstead* criterion to be rejected was the requirement that the eavesdropped individual must have intended that his voice be projected outside the private area within which he spoke.[12] The proposition that the Fourth Amendment protects only against the unreasonable search and seizure of tangibles was the next *Olmstead* criterion to be undermined.[13] By implication, the Court in *Silverman v. United States*[14] held that the interception of conversation reasonably intended to be private could constitute a "search and seizure" within the meaning of the Fourth Amendment.[15] The *Silverman* Court

8. *Id.* at 464-465.

9. 47 U.S.C. Sec. 605 (1934).

10. Nardone v. United States, 302 U.S. 379, 383 (1937).

11. *See* Goldman v. United States, 316 U.S. 129 (1942).

12. In Goldman v. United States, 316 U.S. 129 (1942), the petitioners were convicted of conspiring to violate the National Bankruptcy Act. They had schemed to retain a secret profit on the sale of a debtor's estate. By the use of a detectaphone placed against the outside of a partition wall, government agents had been able to overhear incriminating conversations among the petitioners. The Court refused to distinguish *Goldman* from *Olmstead* on the basis that in *Olmstead* there was an intention to project the voice outside the room, whereas in *Goldman* the conversations were intended to remain within. By implication then the "intention" criterion was disposed of as the Court used the other two *Olmstead* criteria for deciding the case. They held that the government eavesdrop was not within the Fourth Amendment because there had been no physical trespass, and a conversation by definition does not meet the tangibility requirement.

13. This proposition was attacked first in Irvine v. California, 347 U.S. 128 (1954) (dictum); and Silverman v. United States, 365 U.S. 505, 511 (1961); and subsequently in Wong Sun v. United States, 371 U.S. 471 at 485 (1963); Berger v. New York, 388 U.S. 41 at 51 (1966); and Warden v. Hayden, 387 U.S. 294, 304 (1967).

14. 365 U.S. 505, 511 (1961).

15. The *Silverman* Court held that there had been trespass within the meaning of the Fourth Amendment, but the facts show that nothing but the petitioners' conversations were "searched and seized" (electronic eavesdropping). Still the Court held that the petitioners' rights under the Fourth Amendment had been violated. The

also relaxed the trespass requirement to a great extent.[16] Thus the only element of the *Olmstead* holding being even moderately followed was physical trespass. Following *Silverman,* the Court reduced the trespass requirement to a mere formality in *Clinton v. Virginia,*[17] holding inadmissible evidence obtained through the use of an electronic eavesdropping device which had been fastened to the outside of a partition wall by penetration no greater than that of a thumb tack.[18]

Having established by its holding in *Silverman* that a conversation could be subject to a "search and seizure," the Court in *Osborn v. United States*[19] determined that under sufficiently "precise and discriminate" circumstances[20] a federal court may empower government agents to use concealed electronic equipment to eavesdrop.[21] However, this was qualified in *Berger v. New York,*[22] in which the Court held void on its face a New York statute[23] which authorized wiretapping based on warrants issued by magistrates on a showing of probable cause, stating that the statute lacked the necessary particularization to make it constitutional.[24]

By its holding in *Katz v. United States*[25] the Court has removed the

Court has made subsequent exception to the *Silverman* holding that interception of conversation reasonably intended to be private constitutes a "search and seizure." In Lanza v. United States, 370 U.S. 139 at 143 (1962) it held that a jail is not a "constitutionally protected area" (although they failed to describe what a constitutionally protected area is); hence, conversations therein even though intended private, are not protected by the Fourth Amendment. *Cf.* Hester v. United States, 265 U.S. 57 (1924); On Lee v. United States, 343 U.S. 747 (1952); Rios v. United States, 364 U.S. 253 (1960); Lopez v. United States, 373 U.S. 427 (1963).

16. In *Silverman,* police had inserted a "spike-mike" several inches into a party wall so that it touched a heating duct which acted as a gigantic microphone enabling police to hear conversations throughout the petitioner's house. The Court, recognizing the technical distinctions involved, nevertheless held that this penetration was trespass within the meaning of the Fourth Amendment. 365 U.S. at 512.

17. 377 U.S. 158 (1964), *rev'g per curiam* 204 Va. 275, 130 S.E.2d 437 (1963). The per curiam reversal was based on the *Silverman* rationale.

18. Clinton v. Commonwealth, 204 Va. 275, 281-282, 130 S.E.2d 437, 442 (1963).

19. 385 U.S. 323 (1966).

20. "A detailed factual affidavit alleging the commission of a specific criminal offense directly and immediately affecting the administration of justice" was held to satisfy the requirement. *Id.* at 330.

21. *Id.* at 329-330.

22. 388 U.S. 41 (1966).

23. N.Y. CODE OF CR. PROC., Sec. 813-a.

24. The New York statute laid down no requirement for particularity in the warrant as to what specific crime had been or was being committed, nor did it require that the places to be searched or the things or persons to be seized be described as specifically required by the Fourth Amendment. Berger v. New York, 388 U.S. 41 at 55-59 (1966).

25. 88 S. St. 507 (1967).

final obstacle which had prevented eavesdropping from coming completely within the purview of the Fourth Amendment. Applying *Berger*, the Court held that no physical trespass was necessary to violate the petitioner's rights under the Fourth Amendment, since "the Fourth Amendment protects people not places." [26] As the FBI had not received prior judicial authorization for their "search and seizure," evidence gained thereby was in violation of the Fourth Amendment and therefore inadmissible.[27]

The combined effect of *Katz* and *Berger* should be far reaching. No longer will police or government agents be able to introduce evidence gained by the use of sophisticated electronic eavesdropping equipment without having been given antecedent judicial authority. Before *Katz* it was conceivable that agents operating a great distance from a victim's office or home could have eavesdropped his conversations therein without being guilty of a "trespass." [28] In the light of *Katz* and *Berger*, evidence gained in such a subtle manner will be inadmissible in the absence of proper antecedent judicial authority even though no physical trespass is involved.

26. Mr. Justice Black entered a rather strong dissent. He agrees that the ends reached by the Court are desirable but cannot justify the majority's liberal construction of the Fourth Amendment. Katz v. United States, 88 S. Ct. 507 at 518 (1967) (dissenting opinion). It is Mr. Justice Black's contention that the Fourth Amendment applies to tangibles but not intangibles such as conversation which to his mind cannot be "searched and seized." Mr. Justice Black also maintains that one cannot describe with particularity future conversations which by their very nature are nonexistent. *Id.* at 523.

27. The *Katz* Court went on to say that an individual is entitled to as much protection in a public phone booth as he is in an office, home or hotel room, since "wherever a man may be he is entitled to know that he will remain free from unreasonable searches and seizures." *Id.* at 515.

28. Parabolic microphones can intercept conversations held hundreds of yards away, and other devices are available which enable an eavesdropper to overhear a conversation taking place in a closed room by decoding the sound vibrations that pass through a window therein. As to the future, acoustical engineers predict that it will be only a short time before it is possible to utilize ultrasonic or electromagnetic waves to penetrate any structural material for the purpose of overhearing conversations. *See generally* S. DASH, R. SCHWARTZ AND R. KNOWLTON, THE EAVESDROPPERS (1959); M. BRENTON, THE PRIVACY INVADERS (1964)