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Constitutional Law: Eavesdropping Statute Held Violative of Fourth Amendment

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Petitioner was convicted of conspiracy to bribe a New York state official. The conviction was based upon evidence obtained pursuant to a New York statute[1] permitting the use of electronic eavesdropping equipment.[2] Petitioner appealed on the grounds that the statute authorized trespassory invasion into a constitutionally protected area, allowed general searches for mere evidence, and violated the privilege against self-incrimination.[3] Reversing the New York Court of Appeals, the United States Supreme Court *held* the statute to be unconstitutional as it did not meet the requirements of the fourth and fourteenth amendments. *Berger v. New York*, 388 U.S. 41 (1967).

The problem of electronic search and seizure[4] first came before the Supreme Court[5] in *Olmstead v. United States*,[6] where

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1. N.Y. CODE CRIM. PROC. § 813-a (1957).

2. There were three different "bugs" used in compiling evidence in this case. The first was used to record a conversation between one Pansini and an employee of the state liquor authority. With his consent, a device was placed on Pansini for use during a meeting relating to obtaining a liquor license. This conversation led police to seek an order authorizing the "bugging" of an attorney's office. Information from this second device led to another man, Harry Steiman. An order was obtained to plant a device in Steiman's office and it was there that the police found evidence of Berger's role as a "go-between." Berger's standing to object to these orders was assumed by the majority. *See* Jones v. United States, 362 U.S. 257 (1960).

3. The Court found it unnecessary to specifically discuss petitioner's mere evidence and fifth amendment claims because of its ruling on the fourth amendment issue. However, the Court did mention that petitioner's argument concerning mere evidence had been invalidated by Warden v. Hayden, 387 U.S. 294 (1967). The *Hayden* Court held that the mere evidence rule, established in Gouled v. United States, 255 U.S. 298 (1921), was no longer valid, since the principal object of the fourth amendment was the protection of privacy rather than property.

4. "Wiretapping" is the interception of both sides of a telephone conversation by the use of equipment which is connected to the wires carrying the communication. "Bugging" is the placing of a listening device so as to overhear what is taking place in a particular location. The "bugged informer" describes the practice of providing a party aiding the police with a device which allows conversations to be overheard or recorded by the police. For the purposes of this discussion the term "electronic search and seizure" refers to any use of such devices by the police.

5. State court decisions prior to Supreme Court cases in this area did not involve questions of validity of search and seizure but rather of accuracy of reports, intelligibility of what was heard, and identification of voices. *See, e.g.*, State v. Minneapolis Milk Co., 124 Minn. 34, 144 N.W. 417 (1913); State v. Hester, 137 S.C. 145, 134 S.E. 885 (1926). Fourth amendment questions were not involved as the majority of

the Court sustained convictions based on evidence obtained by "tapping" defendants' telephone conversations.[7] In so doing, the Court established two general principles concerning electronic search and seizure. Ruling that the words of the amendment must be read in the light of what was deemed an unreasonable search at the time of the amendment's adoption,[8] and though such language was to be liberally construed,[9] it could not be extended beyond the obviously tangible nature of the items listed therein,[10] the *Olmstead* Court held that conversations were not within the "persons or things" protected by the fourth amendment.[11] The Court further ruled that, even if conversations were protected, no trespass had taken place and no unreasonable search had been conducted since under the terms of the fourth amendment a wiretap did not constitute an entry into the houses or offices of the defendants.

The Court in *Olmstead* also stated that if Congress desired to protect the secrecy of telephone communications, it could

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states had rejected the federal exclusionary rule of Weeks v. United States, 232 U.S. 383 (1914), and were still operating under the common-law rule that relevant evidence was admissible no matter how obtained.

6. 277 U.S. 438 (1928).

7. The defendants in *Olmstead* argued that this evidence should have been excluded either because the "tapping" was contrary to a Washington statute, REMINGTON'S COMP. STAT. ch. 2656, § 18 (1922), or in the alternative, because it constituted an unreasonable search and seizure. After ruling that conversation was not protected by the fourth amendment the Court stated that the statutory violation was unimportant as the federal exclusionary rule applied only to constitutional violations. 277 U.S. at 467.

8. *See* Carroll v. United States, 267 U.S. 132, 149 (1925).

9. Gouled v. United States, 255 U.S. 298, 304 (1921); Boyd v. United States, 116 U.S. 616, 635 (1886); *Ex parte* Lange, 18 U.S. (Wall) 163, 178 (1873).

10. Four Justices dissented in the *Olmstead* decision. Justice Holmes was not prepared to hold the fourth amendment applicable to conversations, but felt that evidence seized by a wiretap should have been excluded, seemingly by the Supreme Court's supervisory powers. Justice Brandeis, joined by Justices Stone and Butler, would have held that conversations were protected. These Justices based their opinions upon Boyd v. United States, 116 U.S. 616, 630 (1886), where it was said: "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . ."

11. "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." U.S. CONST. amend. IV.

pass a rule of evidence prohibiting the introduction of wiretap evidence.[12] In 1934 Congress responded to this invitation[13] by passing a statute prohibiting the unauthorized interception and divulgence of communications.[14] Although the Supreme Court has subsequently applied this Act to the federal government,[15] encompassing both interstate and intrastate communications,[16] the scope of protection that this statute affords is somewhat limited. For example, the Court has interpreted the "communications" protected by the Act to include only the means of transmitting a conversation. Therefore, an officer may eavesdrop on a conversation or listen to one end of a telephone conversation so long as he does not actually tap the telephone lines.[17] In addition, either party to a communication may authorize a third person to listen in.[18] Furthermore, since the statute is only a rule of evidence, the Court has refused to extend its application to the states.[19]

Notwithstanding the Act's inherent infirmities, the Court has allowed additional judicial emasculation of the statute as a protection against eavesdropping. While the doctrine of the

12. Olmstead v. United States, 277 U.S. 438, 465 (1928).

13. Nardone v. United States, 302 U.S. 379 (1937). The Act did not specifically say such evidence could not be used in court, but the Court considered the relating of a communication in court as a "divulgence" within the meaning of the Act. *See also* McGuire v. Amrein, 101 F. Supp. 414 (D. Md. 1951).

14. ". . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications to any person . . . ." 47 U.S.C. § 605 (1964).

15. Nardone v. United States, 302 U.S. 379 (1937). Although the government had argued that Congress had not intended that the federal government should fall within this ban, the Court ruled that "any person" comprehends federal agents as well as other persons.

16. Since the same lines were used to carry interstate and intrastate messages and a "tapper" could not discriminate between the two, the statute must protect both in order to protect interstate communications. Weiss v. United States, 308 U.S. 321 (1939). *See also* United States v. White, 228 F.2d 832 (7th Cir. 1956); Sablowsky v. United States, 101 F.2d 183 (3d Cir. 1938); Valli v. United States, 94 F.2d 687 (1st Cir. 1938); Craska v. New York Tel. Co., 239 F. Supp. 932 (N.D. N.Y. 1965); United States v. Lipinski, 151 F. Supp. 145 (D.N.M. 1957).

17. Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942).

18. Rathbun v. United States, 355 U.S. 107 (1957). *See also* United States v. Bookie, 229 F.2d 130 (7th Cir. 1956); United States v. Pierce, 124 F. Supp. 264 (N.D. Ohio 1954), *aff'd*, 224 F.2d 281 (6th Cir. 1955).

19. Pugach v. Dollinger, 365 U.S. 458 (1961); Schwartz v. Texas, 344 U.S. 199 (1952).

"fruit of the poisonous tree"[20] has been applied to this evidentiary rule,[21] the testimony of a party to an intercepted telephone conversation—induced to testify as to other matters by a federal agent's knowledge of that conversation—is still admissible so long as neither the intercepted conversation nor any information contained therein is introduced at the trial.[22] Further, since the statute forbids the interception *and* divulgence of communications, it is the opinion of the Department of Justice that both these elements are necessary to constitute a violation.[23] The Justice Department has also taken the position that "divulgence" does not mean the reporting of a communication within the Department.[24] Although the Supreme Court has not decided this question, lower courts have reached opposite conclusions.[25] These administrative interpretations and the Supreme Court's decisions limiting the applicability of the statute make it clear that telephone users are not completely protected from the

20. This doctrine was established in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), where the Court held that evidence which was discovered as a result of information obtained from an illegal search was inadmissible—unless the evidence would have been reasonably discovered in another way.

21. Weiss v. United States, 308 U.S. 321 (1939); Nardone v. United States, 302 U.S. 379 (1937).

22. United States v. Goldstein, 316 U.S. 114 (1942). This case is factually similar to that of Weiss v. United States, 308 U.S. 321 (1939). In *Weiss*, however, the government not only used the conversations to induce witnesses to testify but also introduced the conversations as evidence at the trial. This latter use resulted in a reversal of the convictions. The government had argued that these communications were being divulged with "permission of the sender;" but the Court held that "permission" did not mean "authorization consisting of the agreement to turn state's evidence, by some of the defendants after they had been apprised of the knowledge of their communications by Government's representatives, and in the hope of leniency . . . ." Weiss v. United States, *supra* at 330.

23. This proposition was first advanced by Attorney General Jackson in 1941. *Hearings Before Subcomm. No. 1 of the House Comm. on the Judiciary on H.R. 2266 and H.R. 3099*, 77th Cong., 1st Sess. 18 (1941). This question has not been decided by the Supreme Court. In fact, recent cases have specifically left the question open. *See* Benanti v. United States, 355 U.S. 96 (1957); Rathbun v. United States, 355 U.S. 107 (1957).

24. Attorney General Biddle stated that to prohibit divulgence was not to prohibit an agent from reporting to his superiors. N.Y. Times, Oct. 9, 1941, at 4, col. 2.

25. *See, e.g.*, United States v. Coplon, 91 F. Supp. 867, 871 (D.D.C. 1950) (dicta supporting the government's position), *rev'd on other grounds*, 191 F.2d 749 (D.C. Cir. 1951). *Contra*, United States v. Coplon, 88 F. Supp. 921, 925 (S.D.N.Y.), *rev'd and remanded*, 185 F.2d 629, 636 (2d Cir. 1950).

threat of governmental wiretapping.[26]

The principles established in *Olmstead* were also applied to the first "bugging" case[27] to reach the Supreme Court. In *Goldman v. United States*,[28] the majority affirmed a conviction obtained through evidence "seized" by federal agents using a listening device placed against the outside of defendants' wall. The Court found *Olmstead* to be indistinguishable and reaffirmed the principles established therein.

However, a substantial change in the Court's approach to bugging was initiated in *Silverman v. United States*.[29] The Court rejected communicative evidence which had been seized by the use of a "spike" microphone inserted into defendants' wall. The listening apparatus had been inserted so that the point came to rest against a heating duct thereby causing the duct to act as a giant microphone extending throughout the the house. The Court held that this invasion of a part of the premises occupied by the defendants was a trespass.[30] Since the trespass was an unreasonable governmental intrusion into the constitutionally protected area of the home, the Court found it unnecessary to consider the viability of *Olmstead's* conclusion that mere words were outside the protection of the fourth amendment. Moreover, in *Wong Sun v. United States*,[31] decided two years after *Silverman*, the Court stated that it "followed" from the holding in *Silverman* that the fourth amendment protects against the overhearing of verbal statements incident to a trespass.[32] These decisions indicate that while conversation is now to be included within the fourth amendment protections, some actual trespass must occur before eavesdropping becomes an un-

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26. By order of President Johnson federal agents may wiretap in those cases in which the national security is threatened. N.Y. Times, July 16, 1965, at 6, col. 3. Inasmuch as this is only an administrative decision it is subject to change.

27. For the distinction between a "wiretap" and a "bug," see note 4 *supra*.

28. 316 U.S. 129 (1942).

29. 365 U.S. 505 (1961).

30. *Id.* at 510.

31. 371 U.S. 471 (1963).

32. Wong Sun v. United States, 371 U.S. 471, 484 (1963). This case, though concerned with statements overheard by federal agents, is not one involving electronic search and seizure. The statements were made by one James Toy upon his arrest at his home. The Court, quoting *Silverman* as holding that verbal statements are protected from illegal seizure, as are the traditional "papers and effects," held that these statements were the "fruits" of an arrest made without probable cause.

constitutional activity.[33]

Despite this recognition of the applicability of the fourth amendment, the Court has upheld the use of electronic devices where a supposed accomplice or co-conspirator has hidden a microphone on his person in order that the incriminating conversation might be recorded or overheard by the police.[34] Justification for this action lies in the rationale that a report of the conversation could have been given by the cooperating party whether or not the conversation was recorded.[35] The electronic device is therefore used to provide an additional witness to the conversation or to aid the testifying party's memory. In either case it is merely a method of establishing the truth of the witness' report of the conversation. Strictly speaking, this use of electronic devices is not eavesdropping as there is arguably no surreptitious overhearing of a conversation that could not otherwise have been heard.[36]

While the Supreme Court was gradually developing the constitutional law applicable to electronic eavesdropping, several states enacted regulatory statutes.[37] Once the Court determined

33. The trespass that is required need only be very slight. While the government in *Silverman* argued that insertion of a spike into a party wall was not a trespass under local law, the Court said that the decision should not turn upon "the technicality of a trespass upon a party wall as a matter of local law, but is based upon the reality of an actual intrusion into a constitutionally protected area." Silverman v. United States, 365 U.S. 505, 512 (1961).

34. *See, e.g.*, Osborn v. United States, 385 U.S. 323 (1966) (supposed co-conspirator); Lopez v. United States, 373 U.S. 427 (1963) (recording of bribe attempt of a revenue agent).

35. *See, e.g.*, Annot., 97 A.L.R.2d 1283, 1289 (1964).

36. Lopez v. United States, 373 U.S. 427 (1963); United States v. Pullings, 321 F.2d 287 (7th Cir. 1963); United States v. Vittoria, 284 F.2d 451 (7th Cir. 1960); People v. Albert, 182 Cal. App. 2d 729, 6 Cal. Rptr. 473 (1960).

37. Thirty-six states have statutes which in some form protect the individual from the use of electronic devices. Illinois is the only state which prohibits bugging and wiretapping by both government officials and private individuals. ILL. REV. STAT. ch. 38, §§ 14.1-.7, ch. 134, § 16 (1964).

Six other states also forbid all types of electronic eavesdropping: CAL. PEN. CODE §§ 640, 653h-j (West Supp. 1965); MD. ANN. CODE art. 27, § 125A, art. 35, §§ 92, 93 (1957); MASS. ANN. LAWS ch. 272, § 99 (Supp. 1966); NEV. REV. STAT. §§ 200.620, .630, .650 (1963); N.Y. PEN. LAW § 738 (Supp. 1966); ORE. REV. STAT. § 165.540(1) (1963). However, each of these states permits some sort of official electronic search and seizure. The California "anti-bugging" statute allows the police to obtain permission from their superiors or the local district attorney to conduct an eavesdropping operation. In addition, California's wiretap ban, though setting up no procedures, extends only to unauthorized wiretapping, seemingly leaving the way open for some sort of authoriza-

that conversation was protected by the fourth amendment, the exclusionary rule established by *Mapp v. Ohio*[38] required that these statutes satisfy federal search and seizure standards[39] in order for evidence obtained under them to be admissible in court.[40]

The federal standards for the issuance of search warrants are based on the fourth amendment's conditions: "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." Statutes[41] and court

tion. The remaining five states with "total bans" have set up specific procedures by which the police can obtain a court order to conduct electronic surveillance; MD. ANN. CODE art. 35, § 94 (1957); MASS. ANN. LAWS ch. 272, § 99 (Supp. 1966); NEV. REV. STAT. § 200.660 (1957); N.Y. CODE CRIM. PROC. § 813-a (1957); ORE. REV. STAT. § 141.720 (1963).

Twenty-nine states prohibit only wiretapping; however, all but twelve of these have statutory language which would permit official "taps": ALA. CODE tit. 48, § 414 (1958); ALASKA STAT. § 42.20.030 (1962); COLO. REV. STAT. § 40-4-17 (1963); CONN. GEN. STAT. REV. § 53-140 (1958); DEL. CODE ANN. tit. 11, § 559 (Supp. 1966); HAWAII REV. LAWS § 309A-1 (Supp. 1965); N.M. STAT. ANN. § 40A-12-1 (1964); N.C. GEN. STAT. § 14-155 (1953); PA. STAT. ANN. tit. 15, § 2443 (1958); R.I. GEN. LAWS ANN. § 11-35-12 (1956); TENN. CODE ANN. § 65-2117 (1955); UTAH CODE ANN. § 76-48-11 (1953). The Florida Supreme Court has decided that its statute, FLA. STAT. ANN. § 822.10 (1965), was not meant to include the police. Williams v. State, 109 So. 2d 379 (Fla. 1959). The Louisiana statute specifically exempts the police. LA. REV. STAT. § 14:322 (1950). The fifteen remaining states with wiretap bans have not set up any procedures by which the police may conduct wiretaps, but all the statutes contain wording which would seemingly grant police wiretap privileges. The statutes refer to wiretaps which are, *e.g.*, "unauthorized," "without legal authority," or "willful and malicious": ARK. STAT. ANN. § 73-1810 (1957); IDAHO CODE ANN. §§ 18-6704, 6705 (1947); IOWA CODE § 716.8 (1950); KY. REV. STAT. § 433.430 (1963); MICH. STAT. ANN. § 28.808 (1954); MONT. REV. CODE ANN. § 94-3203 (Supp. 1967); NEB. REV. STAT. § 86-328 (1966); N.J. STAT. ANN. § 2A:146-1 (1953); N.D. CENT. CODE § 12-42-05 (1967); OHIO REV. CODE ANN. § 4931.28 (1954); S.D. CODE § 13.4519 (1939); VA. CODE ANN. § 18.1-156 (Supp. 1960); WIS. STAT. § 134.39 (1957); WYO. STAT. ANN. § 37-259 (1957).

38. 367 U.S. 643 (1961). The requirements of the fourth amendment were held applicable to the states through the due process clause of the fourteenth amendment.

39. Two years after the *Mapp* decision, the Court held that the states must apply federal standards in the area of search and seizure. Ker v. California, 374 U.S. 23 (1963). The *Silverman* decision was applied to the states in Clinton v. Virginia, 377 U.S. 158 (1964).

40. The federal government has attempted to use wiretap evidence seized under state law in federal court. This practice was struck down in Benanti v. United States, 355 U.S. 96 (1957). The Court held that wiretap evidence was inadmissible in federal court no matter under what authority seized.

41. *See, e.g.*, 18 U.S.C. § 3105 (1964) (persons authorized to serve

rulings have added specificity to these general requirements for the issuance, execution, and operation of search warrants. The basic prerequisites for the issuance of a search warrant require that there be a showing of facts upon which a reasonable and prudent man would be led to believe that there had been a commission of the crime charged,[42] that the warrant must be issued by a neutral and detached magistrate,[43] and that the warrant is to specify the items to be seized so that the executing officer will have nothing left to his discretion.[44] Further, the execution of a warrant must be in exact accordance with its terms; only those items specified may be seized.[45] Finally, a search warrant authorizes only a single search[46] and that search must come to an end when the items called for are found.[47]

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warrant); FED. R. CRIM. P. 41(b) (grounds for warrant issuance); MINN. STAT. § 626.03 (1947) (to whom directed and contents); N.Y. CODE CRIM. PROC. § 801 (1957) (service at night).

42. Ker v. California, 374 U.S. 23 (1963); Dumbra v. United States, 268 U.S. 435 (1925); Stacey v. Emery, 97 U.S. 642 (1878); United States v. Sebo, 101 F.2d 889 (7th Cir. 1939); State v. Yet Ning Yee, 145 Cal. App. 513, 302 P.2d 616 (1956).

43. That the amendment so requires was established in Johnson v. United States, 333 U.S. 10, 14 (1948). *See also* Schmerber v. California, 384 U.S. 757, 770 (1966); United States v. Ventresca, 380 U.S. 102, 106 (1965); Aguilar v. Texas, 378 U.S. 108, 111 (1964); United States v. Wallace & Tiernan Co., 336 U.S. 793, 796 (1949).

44. Stanford v. Texas, 379 U.S. 476 (1965); United States v. Rabinowitz, 339 U.S. 56 (1950); Marron v. United States, 275 U.S. 192, 195 (1927).

45. Stanford v. Texas, 379 U.S. 476 (1965); Marron v. United States, 275 U.S. 192, 195 (1927); Steele v. United States, 267 U.S. 498 (1925); United States v. Brunett, 53 F.2d 219 (W.D. Mo. 1931); Brooks v. State, 235 Md. 23, 200 A.2d 177 (1964); Wacksman v. Harrell, 174 Ohio St. 338, 189 N.E.2d 146 (1963). *But see* Harris v. United States, 331 U.S. 145 (1947), where the Court said that there is nothing in the fourth amendment which inhibits the seizure by law enforcement officers of "contraband," *i.e.*, fruits and instrumentalities of crime or property the possession of which is a crime, even though the presence of such property was not known when the search was initiated, so long as the officers are validly on the premises.

46. State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); McDaniel v. State, 197 Ind. 179, 150 N.E. 50 (1926); Coburn v. State, 78 Okla. Crim. 362, 148 P.2d 483 (1944); Duncan v. State, 11 Okla. Crim. 217, 144 P. 629 (1914); Gamble v. Keyes, 35 S.D. 644, 153 N.W. 888 (1915); McDonald v. State, 195 Tenn. 282, 259 S.W.2d 524 (1953); McNear v. Rhay, 398 P.2d 732 (Wash. 1965); State v. Moran, 103 W. Va. 753, 138 S.E. 366 (1927).

47. This requirement follows logically from the rule that only items described in the warrant may be seized. To hold otherwise would permit a police officer, after finding the desired items, to conduct a general search. The fourth amendment was specifically designed to prohibit general warrants. *See* Stanford v. Texas, 379 U.S. 476, 481 (1965).

The instant case is the first in which the Supreme Court has examined the constitutionality, under the fourth amendment, of a state's attempt to authorize trespassory electronic search and seizure.[48] The New York statute authorizes the issuance by a judge of an ex parte order for eavesdropping upon the oath of a district attorney, or police officer above the rank of sergeant, that there are reasonable grounds to believe that evidence of crime may be obtained by such eavesdropping. The person or persons affected by the surveillance must be named, and the order is effective for no more than two months. However, it may be renewed by the judge who originally signed it if he determines that such renewal is in the public interest.[49]

Reaffirming the proposition that the fourth amendment applies to conversation, the *Berger* Court held the statute unconstitutional. Even though it recognized that the New York statute demanded a showing of probable cause[50] and interposed an issuing magistrate between the people and the police, the Court held that the statute in authorizing the ex parte order did not comply with the requirements of the fourth amendment.

The requirement of specificity of the warrant was deemed not to be met in that eavesdropping was authorized without specifying the crime which had been or was being committed, the "place to be searched," or the "things to be seized." Moreover, the statute did not require that the eavesdropping cease once the conversation sought had occurred. Further, there was no provision for notice to the party under observation as is required by a conventional warrant, and there was no requirement of a showing of special facts which would excuse this defect. Nor was there any requirement of a return being made to the court upon the warrant. In addition, the Court objected to the two-month duration of the permitted eavesdropping, stating that this was tantamount to authorizing a series of searches under the same warrant with no new showing of probable cause. Simi-

48. The outcome is important because other states which have adopted court procedures for electronic search and seizure have used the New York act as a model. *See* MD. ANN. CODE art. 35, § 94 (1957); MASS. ANN. LAWS ch. 272, § 99 (Supp. 1966); NEV. REV. STAT. § 200.660 (1963); ORE. REV. STAT. § 141.720 (1963).

49. N.Y. CODE CRIM. PROC. § 813-a (1957).

50. Although the New York Act uses the words "reasonable ground," both New York and federal cases have held that this phrase is equivalent to "probable cause." Draper v. United States, 358 U.S. 307, 313 (1959); People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S.2d 266 (Sup. Ct. 1965), *rev'd on other grounds*, 27 App. Div. 2d 572, 276 N.Y.S.2d 168 (1966).

larly, the renewal clause authorizing the judge to extend the electronic surveillance if such was "in the public interest" was held to be objectionable in that it did not seem to require a new showing of probable cause.

The Court held that because of these defects, the statute authorized a trespassory invasion of the home by general warrant, contrary to the command of the fourth amendment.[51] It was further stated that unless a warrant or statute authorizing eavesdropping could be drawn in compliance with the amendment, the fruits of eavesdropping devices were barred from the courts.

In response to the contention that no such warrant or statute is possible, the Court cited *Osborn v. United States*[52] wherein the Court upheld a conviction based upon recordings made under a court order. In *Osborn*, two federal judges authorized the placing of a device upon the person of a prospective witness. The order was based upon an affidavit by the witness setting forth previous conversations relating to the bribing of jurors in a case then on trial. The *Berger* opinion pointed to the precise and discriminate procedures by which the order in *Osborn* was obtained and executed. The order for this permissible eavesdropping was limited to one conversation, and was required to particularly describe the type of conversation which was to be recorded. In addition, the officer was required to make a return showing how the order had been executed and what had been seized. By these safeguards the Court in *Osborn* felt that the danger of an unreasonable search and seizure had been minimized.

The Court was undoubtedly correct in holding that the New York statute did not specifically comply with the traditional test of fourth amendment safeguards. However, the decision to apply these tests to strike down the Act, rather than to "graft" these requirements onto the statute as Justice Harlan suggested in his dissent,[53] would seem based more on policy than law.

51. 388 U.S. at 64.

52. 385 U.S. 323 (1966).

53. 388 U.S. at 89. Justice Harlan's position is based upon two rules of statutory construction: first, that in construing state statutes the Court must adopt the construction that the courts of that particular state have given the act; and, second, that a statute should be declared unconstitutional only if no possible constitutional construction can be found therein. The New York cases had ruled that the standards of the fourth amendment were applicable to the electronic search and seizure order. Justice Harlan reasoned that the Act should be so construed by the Supreme Court.

There is the practical argument that electronic devices are of great benefit in preventing crimes and gathering evidence against the barons of organized crime.[54] However, there are contrary arguments that such devices are not compatible with the democratic ideal of the dignity of the individual, that eavesdropping is a dirty business,[55] and that to permit such action will lead to an Orwellian police state.[56] The decision in the instant case would seem to be weighted toward the "privacy side of these two conflicting policies."[57]

In reaching this result, the Court applied the standards which have been previously used to test searches and warrants for tangible objects, but by so doing the Court has severely limited electronic search and seizure. The requirement that both the nature of the crime allegedly committed and the type of conversation sought must be specifically set forth means that evidence and not merely information must be the object of the search. In addition, the rule that an eavesdrop must cease upon the seizure of the conversation sought increases the mechanical difficulties of eavesdropping since the Court would require that for any subsequent conversations a new warrant showing probable cause be obtained. Finally, the Court's objection to the two-month authorization in the instant case and its approval of the "dispatch" with which the search took place in *Osborn* do not make clear what time limitation is to be regarded as reasonable under the fourth amendment. It can be said with certainty only that the reasonableness of the duration of the electronic search will be determined on the facts of each case.[58]

54. *See The Challenge of Crime in a Free Society*, A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 200-03 (1967) (quoted extensively in White's dissent in *Berger*); Donnelly, *Electronic Eavesdropping*, 38 NOTRE DAME LAW. 667 (1963); Silver, *The Wiretapping-Eavesdropping Problem: A Prosecutor's View*, 44 MINN. L. REV. 835 (1960).

55. The "dirty business" phrase has been popular with the various judges and commentators who disapprove of the use of electronic devices. *See* Olmstead v. United States, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting).

56. *See* Greenwalt, *Wiretapping and Bugging: Striking a Balance Between Privacy and Law Enforcement*, CASE & COMM. Sept.-Oct. 1967, at 3; Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891 (1960); Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855 (1960).

57. The various policy arguments in this area have not changed basically since the *Olmstead* decision. *See, e.g.*, 2 U. CIN. L. REV. 409 (1928); 77 U. PA. L. REV. 139 (1928); 15 VA. L. REV. 63 (1928); 35 W. VA. L. REV. 93 (1928).

58. *See, e.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344,

The *Berger* decision arguably establishes two new constitutional requirements for a valid fourth amendment search and seizure. These are the requirements of notice, or the reason for the lack thereof, and of a return made on the warrant. Although these elements have been previously embodied in statutes,[59] by now applying them constitutionally to the use of listening devices, the Court is attempting to provide complete protection for the citizen from the serious invasion of privacy that eavesdropping constitutes. While requiring the police to make a return on the warrant is an obvious safeguard, any giving of notice to a party under surveillance would completely destroy the usefulness of electronic search and seizure. What the Court would require as an excuse for lack of notice is not revealed. In light of *Osborn*, it should be no more than a showing of the importance of the conversation involved and the fact that the desired results could not be obtained if notice were given.

In applying the tangible object requirements to intangible conversations, the Court has seemingly limited the use of listening devices to instances in which the police know almost exactly when a conversation will take place,[60] who the parties will be, and what they will talk about. The price of affording such protection to the right of privacy is the limitation of electronic eavesdropping to corroboration rather than investigation.[61]

The *Berger* decision might be characterized as an open letter to the states on the matter of electronic search and seizure re-

357 (1931). Since the warrant must specify a single conversation, it is logical that the police would be able to listen to that entire conversation, no matter how long it took and what variety of subjects were discussed. Arguably, however, if a conversation has gone on for one or two hours without any mention of the topic for which the warrant was issued, the police might have to cease their surveillance before the conversation was finished.

59. *See, e.g.*, FED. R. CRIM. P. 41(d) (both notice and return); N.Y. CODE CRIM. PROC. § 802 (1957) (return).

60. The only cases in the electronic search and seizure area which the Court seemed specifically to approve were Osborn v. United States, 385 U.S. 323 (1966); Lopez v. United States, 373 U.S. 427 (1963); and On Lee v. United States, 343 U.S. 747 (1952). All of these are cases in which the conversation was monitored with the aid of one of the parties involved, enabling the police to manipulate the time of its occurrence. Furthermore, since the Court's approval was limited to cases where one party to the conversation had authorized its overhearing, the Court may be implying that only in such situations is eavesdropping constitutional. Compare notes 34-36 and accompanying text.

61. The majority in the *Berger* case contended that electronic eavesdropping was not, in fact, as helpful to law enforcement as its proponents argued. 388 U.S. at 60-62.