Constitutional Law - Fourth Amendment - Electronic Eavesdropping

Jay Paul Kahle

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RECENT DECISIONS

CONSTITUTIONAL LAW—FOURTH AMENDMENT—Electronic Eavesdropping—Verbal evidence of gambling activities obtained without a warrant by means of an electronic listening device held inadmissible.


Petitioner was convicted in the United States District Court for the Southern District of California for transmitting wagering information by telephone in violation of a federal statute\(^1\) proscribing the interstate transmission of bets or wagers by wire communication. Petitioner appealed to the United States Court of Appeals for the Ninth Circuit which affirmed.\(^2\) Petitioner then appealed to the United States Supreme Court which reversed\(^3\) holding that petitioner's conviction, based on recorded conversations obtained by Government agents without first securing a search warrant, were improperly admitted into evidence since "the Government's activities in electronically listening to and recording petitioner's words violated the privacy upon which he justifiably relied . . . and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."\(^4\)

The facts indicated that agents of the F.B.I. had been investigating petitioner's activities for some time prior to the act in question, and that their investigation established a strong probability that he was using the telephone for purposes of conducting illegal gambling activities. He was observed on several occasions using the same "bank" of three pay telephone booths at approximately the same time every morning. The Government agents placed a sign on one of the three booths saying "Out of Order" and placed electronic listening and recording devices on top of the other two telephone booths. The electronic surveillance was confined to those periods in which the petitioner was using the booth. Six recordings of approximately three minutes each of petitioner's end of the conversation were obtained and admitted into evidence.

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate commerce of bets or wagers of information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission or a wire communication which entitles the recipient 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 $10,000.00 or imprisoned not more than two years or both.
2. 369 F.2d 130 (9th Cir. 1966).
3. Mr. Justice Stewart wrote for the majority. Mr. Justice White wrote a concurring opinion as did Mr. Justice Douglas with whom Mr. Justice Brennan joined. Mr. Justice Black dissented. Mr. Justice Marshall took no part in the decision.
4. 88 S. Ct. at 512.
Petitioner requested a determination of whether a public telephone booth fell within the meaning of a “constitutionally protected area” and whether “physical penetration” of such an area is necessary before a search and seizure without a warrant violated the Fourth Amendment. Mr. Justice Stewart, writing for the majority declined to answer petitioner’s questions as they were addressed to the Court, indicating that to do so would result in too narrow a resolution of the issues presented. Mr. Justice Stewart believed that the protections of the Fourth Amendment extend to people, not places. While acknowledging that “past cases” embraced the use of the term “constitutionally protected area” he stated that the Court has “never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem.” Further, when an individual knowingly exposes a subject, even in the privacy of his own home, he may not avail himself of Fourth Amendment protection, while an individual who has a reasonable expectation of privacy falls within the protection of the Fourth Amendment even though he is in an area, much like the phone booth here in question, which is readily accessible to the public. Mr. Justice Harlan’s concurring opinion would seem to lend clarity to this proposition. He stated, “I join the opinion . . . which I read to hold only (a) that an enclosed telephone booth is an area where . . . a person has a constitutionally protected reasonable expectation of privacy . . . .” In support of Stewart’s statement that the Amendment protects people not places, Harlan asserted that the “question . . . is what protection it affords to those people. Generally, as here, the answer to that required reference to a place.” (Emphasis added.) In refuting the Government’s argument that the phone booth was a “public place” not subject to Fourth Amendment protection, Harlan said, “the point is not that the booth is ‘accessible to the public’ at other times . . . but that it is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reason-

5. Id. at 510.
7. Lewis v. United States, 385 U.S. 206 (1966). This was not an eavesdrop case, but concerned the admission in evidence of narcotics secured as a result of an undercover agent being invited to petitioner’s home for a sale. Court held that while a house is accorded the full range of Fourth Amendment protection, when it is turned into a commercial center it is entitled to “no greater sanctity than if it were . . . a store, a garage, a car or on the street.” 385 U.S. at 210.
8. Rios v. United States, 364 U.S. 253 (1960). This case involved a search of the taxicab in which petitioner was riding and the “seizure” of narcotics dropped on the floor of the cab allegedly by petitioner. The evidence was excluded since no warrant had been secured nor was the search incident to a lawful arrest.
9. 88 S. Ct. at 516.
10. Id.
Thus, the important element as expressed by both Stewart and Harlan appears to be the "reasonable expectations" of privacy which an individual attaches to any place he may be at any one time. The rule is most clearly expressed by Harlan: "My understanding of the rule... is... first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Having thus defined the "rule" the Court proceeded to consider the Government's main argument.

The main contention in the Government's argument was that since the surveillance technique employed involved no physical penetration of the telephone booth from which petitioner placed his calls, it should not be tested by Fourth Amendment requirements. For this proposition the Government relied heavily, as did the Court of Appeals, upon the decisions in Olmstead v. United States and Goldman v. United States. In Olmstead the Court held that, in the absence of federal statute, evidence of a conversation intercepted by tapping petitioner's phone line at a point outside his home did not fall within the Fourth Amendment protection against "unreasonable search and seizure." Mr. Justice Taft, speaking for the five to four majority, stated that "the (4th) Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of house or offices of defendant." In Goldman, which is strikingly similar on the facts to the present case, the Government employed two types of electronic surveillance techniques. First, they unlawfully entered petitioner's office and planted an electronic listening and recording device inside. The next day, even though the planted microphone did not function properly, the agents were able to hear petitioner's conversations by the use of another electronic device, a detectaphone similar to the device in the present case, which the agents placed against a wall in a room adjoining petitioner's office. The Court distinguished the two techniques holding that whereas placing the microphone and recording device in petitioner's office constituted a trespass and may have been violative of petitioner's Fourth Amendment rights, the placing of the detectaphone against the wall was not a trespass and did not fall under Fourth Amendment protection.

In the instant case Mr. Justice Stewart conceded that "penetration" was required under the rule in the two cases just discussed but indicated that those cases had been decided under the concept that property inter-

11. Id. at 517.
12. Id. at 516.
15. 277 U.S. at 464.
ests controlled the right of the Government to search and seize and that the Fourth Amendment covered only tangible property. He cited _Warden, Maryland Penitentiary v. Hayden_ to support the contention that the principal object of the Fourth Amendment is the protection of privacy and is not limited to property interests. During the course of its opinion in _Hayden_, the Court explained how the shift in emphasis from property to privacy had developed through a "subtle interplay of substantive and procedural reform." They stated that the _Weeks_ decision had established that a defendant could petition for the return of his illegally seized property before trial. But in _Silverthorn Lumber Co. v. United States_ and _Gould v. United States_ the petitioner's property had been returned to them, copies having been retained as evidence by the Government. In those cases, the Court held that supression might be sought under circumstances which would not sustain an action in trespass or replevin, shifting the emphasis from protection of property to protection of privacy.

In _Katz_, Mr. Justice Stewart stated, "[t]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any technical trespass. . . ." As authority he cited _Silverman v. United States_ in which conversations were recorded by Government agents who had inserted a spike which was attached to a microphone, under the baseboard of a room adjoining petitioner's until it hit a heating duct which acted to transmit conversation from petitioner's room. While the _Silverman_ Court held that eavesdropping involving penetration of petitioner's premises was violative of the Fourth Amendment, Mr. Justice Harlan's concurring opinion pointed out "[t]hat case established that interception of conversation reasonably intended to be private could constitute a 'search and seizure,' and that the examination or taking of physical property was not required." He also cited _Wong Sun v. United States_ as further support, stating that it was the first case to hold that verbal statements could be the "fruits" of an illegal search and seizure.

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17. Id. at 299.
19. 251 U.S. 385 (1919). The _Silverthorne_ case involved unlawful seizure of defendant corporations books and the making of copies thereof. On the basis of these copies, the district attorney sought to subpoena defendant to produce the originals. Supreme Court held that the government could not avail itself of knowledge gotten from an illegal search.
20. 255 U.S. 298 (1921). In this case, a business acquaintance of petitioner's, while on an apparent social call to petitioner's office, seized and copies papers at the direction of government agents when petitioner stepped out of his office for a few minutes. Supreme Court held the search was unlawful regardless of the fact that petitioner had given permission to the acquaintance to enter the office.
21. 88 S. Ct. at 512.
23. 88 S. Ct. at 517. See also 40 NORTH CAROLNA L. REV. 115 (1961).
The Government further contended that because of the manner in which the surveillance was conducted the "search and seizure" affected complied with constitutional standards. Justice Stewart flatly rejected this contention:

It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is, that this restraint was imposed by the agents themselves, not by a judicial officer. . . . In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end.25

Mr. Justice Stewart indicated that the Government's activities in this case could have been authorized by the appropriate authority:

It is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly appraised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place.26

To further support his view, Stewart cited Osborn v. United States27 and Berger v. State of New York.28 In Osborn two judges authorized a witness to secretly record conversations between himself and another. Petitioner sought to exclude the recording from being admitted into evidence. The Court held the evidence was admissable because of the authorization of the judges based on "a factual affidavit alleging the commission of a specific criminal offense . . . for the narrow and particularized purpose of ascertaining the truth of the affidavit's allegation."29 In declaring a New York State wire tapping statute "deficient on its face" in Berger, the Court stated, "New York's statute lays down no such 'precise and discriminate' requirements. Indeed, it authorized the indiscriminate use of electronic devices as was specifically condemned in Osborn."30

25. 88 S. Ct. at 513. United States v. Jeffers also held, "Over and again this Court has emphasized that the mandate of the Fourth Amendment requires reference to judicial process. In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers, but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purpose intended." 342 U.S. 48 at 51 (1951).
26. 88 S. Ct. at 512.
29. 385 U.S. at 330.
30. 388 U.S. at 58.
Mr. Justice Stewart, in *Katz*, concluded, "The Government agents have ignored 'the procedure of antecedent justification . . . that is central to the Fourth Amendment,' a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case."\(^3\)\(^1\)

Mr. Justice Black's dissenting opinion stated that he was unable to agree with the majority's interpretation of the Fourth Amendment for two reasons: (1) the words of the Fourth Amendment do not apply to non-tangible verbal evidence, and (2) the Amendment should not be rewritten by the courts to "bring it into harmony with the times"\(^3\)\(^2\) just to reach a result many believe to be desirable.

Black believed that a conversation which is overheard by eavesdropping whether by wiretapping or plain snooping is not tangible, and under the meaning of the Fourth Amendment can be neither searched nor seized. Black stated that this is the first decision that brought "eavesdropping" within the ambit of Fourth Amendment protection. *Olmstead* and *Goldman* are cited to support this premise. He indicated that the decisions in both those cases rested squarely on the proposition that eavesdropping does not violate the Fourth Amendment, not on a trespass basis as the majority had indicated.\(^3\)\(^3\) Black explained that unauthorized intrusion in search and seizure cases has been determinative of whether the exclusionary rule applied. But he believed that the exclusionary rule formulated in *Weeks*\(^3\)\(^4\) rested on the supervisory power of the Supreme Court over other federal courts and was not rooted in the Fourth Amendment.\(^3\)\(^5\)

Mr. Justice Black disagreed with the majority's opinion that *Olmstead* or *Goldman* had been "eroded" by the *Silverman* and *Hayden* decisions. *Silverman*, he stated, "had expressly refused to re-examine the rationale of *Olmstead* or *Goldman*,"\(^3\)\(^6\) and involved an unauthorized intrusion which called into play the "supervisory exclusionary rule of evidence," while *Hayden*, cited by the majority to show that the Fourth Amendment applied to "intangibles," upheld the seizure of articles of clothing which are tangibles. Mr. Justice Black stated that although the majority opinion indicated that today *Olmstead* and *Goldman* are no longer good law, the fact is that these cases have never been overruled or even "eroded."

Mr. Justice Black concluded by stating that the Fourth Amendment protects privacy only in so far as it prohibits unreasonable searches and

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31. 88 S. Ct. at 515.
32. Id. at 519.
33. See, 2 DUQUESNE L. REV. 107, which discusses the "trespass doctrine" as it applied in Lopez v. United States, 373 U.S. 427 (1963).
34. 232 U.S. 382 (1914).
36. 88 S. Ct. at 521.
seizures of "persons, houses, papers, and effects." It can not be extended, as the Court has done here, to provide a constitutional right of privacy. "With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment. . . . It was never meant for this Court to have such power. . . ."

In summary, the Supreme Court in this decision has established that it will no longer determine the scope of Fourth Amendment protection by tests which are not suited to cope with modern electronic surveillance techniques. Problems of determining what constitutes "penetration" or "trespass" or a "constitutionally protected area" should no longer trouble the Court. Rather, the determination has now become one of deciding the "reasonableness" of an individual's "expectation of freedom from intrusion." It is suggested that this interpretation indicates that the Court is no longer concerned with the technical correctness of Fourth Amendment application, but rather will apply it to secure from governmental invasion the "zone of privacy created by several fundamental constitutional guarantees." In relation with other Amendments which have been interpreted as broad guarantees of individual freedom, the Fourth Amendment will be employed to develop "the constitutional foundations of a yearning for 'privacy,' which constitutes a major component of 'the American dream.'"

It must be emphasized that the Court has not turned its back upon the difficulties of modern day law enforcement, for it clearly indicated that a wiretapping or an electronic surveillance can be lawfully accomplished if authorized by a judge or magistrate with prior knowledge of the need for such investigation and the specific basis upon which it is to proceed. However, the Court reaffirmed its position that such a search conducted without a warrant would result in exclusion of evidence gained thereby, notwithstanding a clear showing of probable cause.

Mr. Justice Brandeis, dissenting in Olmstead stated, "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be. Ways may someday be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be able to expose to the jury, the most inti-

37. Id. at 523.
38. Griswold v. Connecticut, 381 U.S. 479 (1965). In striking down a Connecticut statute which made the use of contraceptives unlawful, Mr. Justice Douglas explained that the guarantees of the Bill of Rights have "penumbras" which create "zones of privacy." For example, the First Amendment right of association while not expressly included in the First amendment is necessary in making the "express guarantees fully meaningful." See Justice Black's dissenting opinion in which he challenged the Court to place limits on this new right of privacy which it had created.
mate occurrence of the home." Mr. Justice Murphy, dissenting in Goldman stated that it was the Court’s "duty to see that this historic provision receives a construction sufficiently liberal and elastic to make it serve the needs and manners of each succeeding generation." The principles decided in this case will help to insure to the present generation, in a period of increasing technological advancement, the protection from unauthorized intrusion intended by the Framers of the Fourth Amendment.

Jay Paul Kahle

CONSTITUTIONAL LAW—SELF-INCrimINATION—An accused gambler’s claim of constitutional privilege against self-incrimination provides a complete defense to federal prosecution for violation of federal tax statutes requiring gamblers to pay excise and occupational taxes.


Convictions, in federal district courts, were secured against petitioners in Marchetti and Grosso for violations of the Federal Gambling Tax statutes. The gambling tax statutes constitute a comprehensive system of congressional enactments designed for both revenue and regulatory purposes. The statutes levy both a fifty dollar occupation tax (evidenced by a gambling stamp) on those contemplating the conduct of gambling enterprises, i.e., those persons in the business of accepting wagers, and a ten per cent excise tax on the proceeds of such wagering. An obligation to pay either of the taxes cannot be satisfied without filing a special registration statement (occupation tax) or a return (excise tax) with the Internal Revenue Service. Both the completed registration statement and return contain extensive information relating to the "taxpayer’s"

41. 277 U.S. at 474.
42. 316 U.S. at 138.

1. The general provisions of this tax may be found in Int. Rev. Code of 1954, §§ 4401-23. Unfortunately, all the pertinent provisions are not collected in one place, but are spread throughout the Code. As cited in succeeding footnotes, §§ 6107, 6103, 6011, 6653, 6806(c), 7201, 7203, 7262 and 7273(b) must be included to comprehend the terms of the tax more fully.
2. The wagering tax statutes grew out of the Investigations of Kefauver Crime Committee of the early 1950’s. Debate showed the statutes were designed in part as a revenue-raising measure. 97 Cong. Rec. 6891, 12238 (1951). Some $115 million has been collected under the wagering tax statutes since 1953. Yet, the amount of revenue produced by the taxes has decreased from $10.5 million in the first year of collection to $6.6 million in fiscal 1965, despite original estimates of $400 million a year. See Caplin, The Gambling Business and Federal Taxes, 8 Crime and Delinquency 371 (1962); McKay, Self-Incrimination and the New Privacy, 1967 Sup. Ct. Rev. 193, 222-3.