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Constitutional Law - Electronic Surveillance and the Supreme Court: A Move Back

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CONSTITUTIONAL LAW—ELECTRONIC SURVEILLANCE AND THE SUPREME COURT: A MOVE BACK?

James A. White was convicted of certain narcotics violations under the United States Code[1] in the United States District Court for the Northern District of Illinois, Eastern Division.[2] The government's case was supported in large part by evidence obtained with the use of a "bugged" informant. By placing a small transistorized kel set transmitter under the clothing of one Harvey Jackson, a police informant, government agents were able to monitor with a radio receiver some of White's incriminating conversations with Jackson.

On eight separate occasions during the months of December 1965 and early January 1966 in Chicago, informant Jackson, under the direction of government agents who had obtained no court order or warrant, transacted business with White for the purchase of heroin while a transmitter was concealed on his person.[3] On four occasions the transactions took place at Jackson's home while, in a car parked outside, government agent Robert DeFauw listened in on a radio receiver. On these occasions a second agent was concealed with Jackson's consent in a kitchen closet and also overheard the conversations. On four other occasions incriminating conversations were transmitted over agent DeFauw's car radio receiver—once from a restaurant, once from White's home, and twice from Jackson's car.

Informant Jackson never appeared in court and never testified himself as to the content of his conversations with White. The defense ob-

1. 26 U.S.C. § 4705(a) (1964 ed.) and 21 U.S.C. § 174 (1964 ed.). These laws were recently repealed: see 26 U.S.C. § 4705(9) and 21 U.S.C. § 174 (1970 ed.).

2. The case was heard in the Chicago courtroom of the Honorable Judge Julius J. Hoffman.

3. White argued, *inter alia*, that Jackson's consent to the use of the transmitter was not "voluntary," but neither the court of appeals nor the Supreme Court considered this issue. The circuit court felt that since in their view the consent of either party to a conversation did not legitimize the presence of a third ear, the issue of Jackson's consent need not be determined. United States v. White, 405 F.2d 838, 844 n.5 (7th Cir. 1969). The Supreme Court, although finally deciding that one participant's consent would allow a third person to listen in, declined to consider the issue of the voluntariness of Jackson's consent "[b]ecause the court below did not reach the issue." United States v. White, 401 U.S. 745, 747 n.1 (1971).

jected to the introduction of the oral testimony of the government agents who had heard the conversations by means of eavesdropping. The defense claimed that the transmission was an unreasonable search and seizure of White's private conversation within the meaning of the fourth amendment and, as such, should be suppressed. The trial court overruled the objections and White was convicted and sentenced to 25 years as a second offender. On review by a three judge panel of the United States Court of Appeals for the Seventh Circuit, the conviction was reversed. The government petitioned for and was granted a rehearing *en banc* in front of the same court, and the majority of the full court affirmed the panel's decision and reversed the conviction,[4] relying principally on the landmark 1969 Supreme Court decision of *Katz v. United States*.[5] The majority felt that the language of *Katz* had undermined the reasoning of an earlier Supreme Court decision in *On Lee v. United States*,[6] which had upheld the use of a bugged informant on facts identical to those presented in *White*. The Supreme Court in a plurality opinion[7] reversed the Court of Appeals and affirmed the conviction, holding that *Katz v. United States*, which extended fourth amendment protections to the seizure of any conversation which the speaker has a justifiable right to expect to be private, does not impose a warrant requirement on electronic eavesdropping where one party to the conversation has consented to having the conversation simultaneously transmitted to a third person. *United States v. White*, 401 U.S. 745 (1971).[8]

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4. United States v. White, 405 F.2d 838 (7th Cir. 1969).

5. 389 U.S. 347 (1967).

6. 343 U.S. 747 (1952).

7. Justice White wrote the plurality opinion in which Chief Justice Burger and Justices Stewart and Blackmun joined. Justices Black and Brennan wrote separate concurring opinions, the latter concurring in the result only on procedural grounds. Justices Douglas, Harlan, and Marshall dissented.

8. The plurality also substantiated their decision in *White* on an alternative, procedural ground. In Desist v. United States, 394 U.S. 244 (1969), the Court held that, analyzing the criteria developed by it in determining whether a new interpretation of the constitution should be applied retroactively, the principles enunciated in *Katz* should only have prospective effect. Thus since the eavesdropping in *White* occurred prior to the decision in *Katz*, the latter case's new interpretation of the fourth amendment would not apply to *White* in any event. The dissenting Justices in *White*, Douglas, Harlan, and Marshall, also took issue with the validity of the *Desist* decision, as did concurring Justice Black, and would apply *Katz* regardless. Justice Brennan concurred solely on the basis of his agreement with the application of *Desist*.

The criteria used by the Court in determining the retroactivity of a decision in the area of criminal procedure have come to be summarized as: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of

The purpose of this note is threefold. It will begin by explaining the constitutional issues presented by electronic eavesdropping and their historical development. There will then be a determination of the extent to which the *White* case has clarified the limits of constitutional protection in the electronic eavesdropping area. The note will conclude by demonstrating how *White* indicates a check in the recent trend of the High Court toward enlarging the scope of fourth amendment protection in the area of the seizure of conversation through the employment of electronic devices.

HISTORICAL DEVELOPMENT OF THE ISSUES[9]

The earliest view of the Supreme Court regarding the use of electronic eavesdropping devices was embodied in *Olmstead v. United States*,[10]

justice of a retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297 (1967). *See also* Linkletter v. Walker, 381 U.S. 618 (1965). For thorough discussions on the issue of retroactivity *see generally* Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960); Mishkin, *The Supreme Court 1964 Term—Foreward: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965); Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U.L. REV. 631 (1967); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966); Spruill, *The Effect of an Overruling Decision*, 18 N.C.L. REV. 199 (1940); Note, *Retroactivity of Criminal Procedure Decisions*, 55 IOWA L. REV. 1309 (1970); Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

9. For other perspectives on the history of electronic eavesdropping and wiretapping see HALL, KAMISAR, LAFAVE, ISRAEL, MODERN CRIMINAL PROCEDURE 334-387 (3rd ed. 1969); Dash, *Katz—Variations on a Theme by Berger*, 17 CATHOLIC U.L. REV. 296 (1968); Greenawalt, *The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968); King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240 (1964); Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 THE SUPREME COURT REVIEW 133; Scoular, *Wiretapping and Eavesdropping Constitutional Development from Olmstead to Katz*, 12 ST. LOUIS L.J. 513 (1968); Sullivan, *Wiretapping and Eavesdropping: A Review of the Current Law*, 18 HASTINGS L.J. 59 (1966); Comment, *Electronic Surveillance*, 17 BAYLOR L. REV. 338 (1965); Comment, *Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope*, 52 CORNELL L.Q. 975 (1967); Comment, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment Framework*, 50 MINN. L. REV. 378 (1965); 32 ALBANY L. REV. 455 (1968); 20 BAYLOR L. REV. 257 (1968); 34 BROOKLYN L. REV. 223 (1968); 82 HARV. L. REV. 187 (1968); 46 TEXAS L. REV. 973 (1968); and for the unique critical view of an intellectual Canadian, *see* Ryan, *The United States Electronic Eavesdrop Cases*, 19 U. TORONTO L.J. 68 (1969).

10. 277 U.S. 438 (1928).

where evidence secured through wiretapping was used to convict petitioners of violation of the National Prohibition Act. The majority considered conversation too intangible to be within the ambit of the fourth amendment prohibition against unreasonable searches and seizures.[11]

> The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or *things* to be seized. . . . [12]

The Court distinguished between seizure without a warrant of a letter or package in the mails, which it had ruled was improper and subject to the exclusionary rule in *Ex parte Jackson*,[13] and seizure of a conversation over telephone lines, which it felt did not violate the fourth amendment.

By further noting that the evidence was obtained "by use of the sense of hearing" without any "entry of the houses or offices of the defendants,"[14] the majority laid the groundwork for what was later referred to as the "physical trespass" doctrine or "physical intrusion" doctrine of the seizure of intangibles. The decision thus held not only that mere words themselves could not be seized within the true meaning of the fourth amendment, but that in any event, some actual physical trespass was required to bring the amendment into play in such circumstances. In *Olmstead* the seizure of petitioners' conversation was not accompanied by any physical intrustion into their property, but merely by a trespass on the telephone lines, which are no more a part of someone's house or office "than are the highways along which they are stretched."[15]

The idea of the need for a "physical trespass" was reaffirmed later in

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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.

The remedy of the exclusionary rule whereby evidence obtained in violation of the fourth amendment could be held inadmissible at trial had already become firmly established at this time in the Federal courts. Weeks v. United States, 232 U.S. 383 (1914). *See also* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Agnello v. United States, 269 U.S. 20 (1925). Today, of course, the exclusionary rule has been held to be a requirement in the state courts also in order to provide an effective remedy for violations of fourth amendment search and seizure limitations. Mapp v. Ohio, 367 U.S. 643 (1961).

12. *Supra* note 10, at 464.

13. 96 U.S. 727 (1877).

14. *Supra* note 10, at 464.

15. *Supra* note 10, at 465.

Goldman v. United States.[16] There the Court found no physical intrusion, and as a result no warrant requirement, when federal officers picked up the conversation inside petitioner's office by merely placing a detectaphone *against* the wall of an adjoining office. By disposing of the case in this manner, the majority never provided itself with the opportunity of re-evaluating the issue of whether, even in the face of a trespass, words could properly be seized within the meaning of the fourth amendment. The Court also rejected a contention that the seizure of petitioner's conversation was a violation of § 605 of the Federal Communications Act,[17] enacted in 1934 subsequent to *Olmstead.* Although petitioner was speaking into a telephone when his words were heard, there was no "interception" of the transmission of the words as they traveled over the telephone itself, which is what the majority felt the Act was designed to prohibit.[18]

The same type of analysis was used by the majority of the Court to dispose of petitioner's contentions in *On Lee v. United States,*[19] a case of special importance to us because of its factual equivalency to *White.* In *On Lee* an old acquaintance-turned-informer named Chin Poy, while wired for sound with an electronic transmitter, engaged On Lee in an incriminating conversation in the latter's laundry while a narcotics agent monitored the conversation outside. The narcotics agent, and not Chin Poy, testified in court. The majority determined:

> . . . [P]etitioner cannot raise the undecided question [of whether the fourth amendment would prohibit the seizure of words in the face of a physical trespass], for here no trespass was committed. Chin Poy entered a place of business with the consent, if not by the implied invitation, of the petitioner.[20]

The majority also rejected contentions "that Chin Poy's subsequent 'unlawful conduct' vitiated the consent and rendered his entry a trespass *ab initio.*"[21] The Court further rejected arguments "that Chin Poy's entrance was a trespass because consent to his entry was obtained by

16. 316 U.S. 129 (1942).

17. Communications Act of 1934 § 605, 47 U.S.C. § 605 (1970 ed.).

18. *Id.*, § 3(a) provides: ". . . No 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 communication to any person. . . ." § 605 of the 1934 Act has since been superceded by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, § 2510 *et seq.*, 18 U.S.C. § 2510 *et seq.* (1968), (1970 ed.), discussed *infra* n.45, 64.

19. 343 U.S. 747 (1952).

20. *Id.* at 751-52.

21. *Id.* at 752.

fraud;"[22] and, on the authority of *Goldstein v. United States*[23]—*Goldman's* companion case—that there was a violation of § 605 of the Federal Communications Act.[24] The four separate dissenting opinions,[25] however, pointed to the growing dissatisfaction with the established concept of fourth amendment protection in this area. In the words of Justice Douglas, who had concurred with the majority in *Goldman* a decade earlier, one could "now more fully appreciate the vice of the practices spawned by *Olmstead* and *Goldman*."[26]

Nine years later, a unanimous Court was ready to assert that some constitutional protection against electronic eavesdropping did exist.[27] Without reversing any previous decisions, the Court in *Silverman v. United States*,[28] held that driving a spiked microphone *through* a party wall and into a heating duct serving petitioner's house, thereby converting the duct into a conductor of sound capable of picking up conversation inside the house, was sufficient trespass to bring the fourth amendment into play regardless of

> . . . whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law.[29]

Despite such language, the majority[30] felt justified in distinguishing *Silverman* from *Goldman*, where the listening device was only placed *up against* the party wall.[31] The Court, while thus reaffirming and devel-

22. *Id.*

23. 316 U.S. 114 (1942).

24. Communications Act of 1934 § 605, 47 U.S.C. § 605 (1970 ed.).

25. Justices Burton, Frankfurter, Black, and Douglas dissented.

26. *Supra* n. 19, at 762.

27. The language of the Court seven years earlier in Irvine v. California, 347 U.S. 128 (1954), where the police had installed a microphone in the bedroom of petitioner's home, also pointed to the fact that the fourth amendment does prohibit the unreasonable seizure of intangibles. The conviction based on the fruits of the misconduct was affirmed, however, since at that time the majority felt that the exclusionary rule did not extend to the states.

28. 365 U.S. 505 (1961).

29. *Id.* at 511.

30. Justice Douglas filed a separate concurring opinion in which he declined to condition fourth amendment rights in any way on the absence or presence of a physical trespass: "The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury. . . . Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded." *Id.* at 513.

31. For an illustration of how the courts struggled with and interpreted the

oping its physical trespass theory, did finally assert by virtue of its decision, although not expressly in the opinion itself, that words could be seized within the meaning of the fourth amendment. The decision also changed the terminology of the physical trespass theory by focusing on "the reality of an actual intrusion into a constitutionally protected area."[32]

If any skeptic was still left in doubt as to the validity of applying fourth amendment safeguards and the exclusionary rule to "mere words" after *Silverman*, his concern was resolved by an explicit statement of the Court in *Wong Sun v. United States*.[33] Mr. Justice Brennan, writing for the majority, clearly articulated that *Silverman* had necessarily implied that the unwarranted seizure of a person's private conversation was subject to fourth amendment safeguards, at least, that is, if the seizure was accompanied by a physical trespass or an "actual intrusion into a constitutionally protected area."[34] But the validity of this latter requirement was soon to be unmistakably denounced in the landmark decision of *Katz v. United States*.[35]

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physical trespass theory without applying the "niceties of . . . real property law," *see* Clinton v. Commonwealth, 204 Va. 275, 130 S.E.2d 437 (1963), where the court found that a mechanical listening device "stuck in" a party wall like a thumb tack, but not "driven into" it, did not amount to a trespass according to the criteria laid out in *Silverman* and *Goldman*. The Supreme Court reversed per curiam in Clinton v. Virginia, 377 U.S. 158 (1964). *See also* Cullins v. Wainwright, 328 F.2d 481 (5th Cir. 1964), *cert. denied*, 379 U.S. 845 (1964), where, in a habeas corpus proceeding, the contents of a conversation monitored by the dropping of a mike through the roof of a house was held inadmissible.

32. *Supra* note 28, at 512. The problem of defining a "constitutionally protected area" also remained. In Lanza v. New York, 370 U.S. 139 (1962), where the conversation between petitioner and his brother in a jail visiting room was monitored and used as evidence, the Court held that ". . . jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room." *Id.* at 143. In United States v. Stone, 232 F. Supp. 396 (N.D. Tex. 1964), a telephone booth was held to be a constitutionally protected area. *Contra,* United States v. Borgese, 235 F. Supp. 286 (S.D. N.Y. 1964), *vacated,* 372 F.2d 950 (2nd Cir. 1967).

33. 371 U.S. 471 (1963).

34. "The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in Silverman v. United States . . . that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.' . . . Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers' action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion." *Id.* at 485.

35. *Supra* note 5. In Berger v. New York, 388 U.S. 41 (1967), decided earlier the same year, the high court found that placing a recorder in petitioner's

In the *Katz* case, a majority of the Court[36] found that the F.B.I.'s actions in attaching an electronic device to the outside of a public telephone booth, thus enabling them to hear and record petitioner's telephone conversation, without first obtaining a warrant, violated the fourth amendment, despite the fact that the device in no way physically penetrated the structure. *Olmstead* and *Goldman* were found to be ". . . so eroded by . . . subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling."[37]

Not content with overruling *Olmstead* and *Goldman*, the Court also questioned the *Silverman* criteria, finding that a discussion of whether or not a public phone booth is a constitutionally protected area

> . . . deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. [citations omitted].[38]

Petitioner had a right to exclude the "uninvited ear" from his conversation and was entitled to assume that the phone booth would effect this exclusion. A majority of the Court thus felt that the violation of a person's fourth amendment rights is contingent more upon his *justifiable expectation of privacy*, rather than upon any physical intrusion into any defined area where he may happen to be at the time.

Prior to this time, an additional set of criteria was developing in those cases where one of the parties to a conversation was working with the authorities and either consented to a monitoring of the conversation by

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office violated the fourth amendment because the New York statute under which the eavesdrop was authorized [N.Y. Code Crim. Proc. § 813-a (McKinney 1958)] was unconstitutional on its face. The Court felt that since the statute allowed a court-ordered eavesdrop on the showing of reasonable grounds to believe that evidence of crime might thus be obtained, with no requirement for particularity as to what specific crime was being investigated or what conversations were to be seized, it authorized an intrusion into a constitutionally protected area without meeting fourth amendment standards for a search and seizure. Because the majority opinion struck down the statute in its entirety, including its provisions for wiretapping under the same criteria, without a discussion of any physical trespass requirement, the case was read by many, including concurring Justice Douglas and dissenting Justice Black, as overruling *Olmstead sub silentio*. But since the facts of the case indicated that the recorder was installed by means of a physical invasion into petitioner's office, the *Olmstead-Goldman-Silverman* physical trespass distinction could still have been considered viable.

36. Justice Black dissented adhering to the *Olmstead* proposition that words are too intangible to be seized within the meaning of the fourth amendment. 389 U.S. at 364-374.

37. *Supra* note 5, at 353.

38. *Supra* note 5, at 351.

a third person, as in *On Lee* and *White*, or recorded the conversation himself, or merely later disclosed the contents of the conversation without the aid of any electronic device. In *On Lee*, as we have noted, the majority based its decision principally on the need for a physical trespass. Finding none, the Court held that the third party monitoring of the conversation between On Lee and agent Chin Poy raised no fourth amendment issue.[39]

In *Lopez v. United States*,[40] however, the Court suggested another factor which could properly be taken into consideration in a fact situation like that presented in *On Lee* (or *White*). Here, an internal revenue agent, while visiting petitioner's office to discuss his failure to pay certain excise taxes, transcribed on a pocket wire recorder his conversation with the petitioner in which the latter offered him a bribe.[41] The Court, at first finding that the agent had petitioner's consent to enter the office and was therefore not guilty of any unlawful invasion thereof, noted also that the recording of the conversation was really not an "eavesdrop" at all, but rather only a means by which the government was able

> . . . to obtain the most reliable evidence possible of a conversation in which [its] own agent was a participant and which that agent was fully entitled to disclose. And the device . . . was carried in and out by an agent who was there with petitioner's assent, and it neither saw nor heard more than the agent himself.[42]

This language indicates that the Court would take a different approach toward those cases where one party to a conversation consented to work as an informer or agent;[43] and it indicates further that there is no requirement for a warrant where an electronic device merely enables the government to obtain corroborative evidence of that which they were lawfully hearing through their undercover agent.[44] By further likening the

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39. See text *supra* at 7-8.

40. 373 U.S. 427 (1963).

41. The agent was also carrying a small pocket transmitter, but it failed to work.

42. *Supra* note 40, at 439. *See* Katz v. U.S., 389 U.S. 347 (1967), Colonade Catering Corp. v. U.S., 397 U.S. 72 (1970) where the court said that fourth amendment rules apply when Congress has authorized inspection but has not provided governing procedures; Mancusi v. De Norte, 392 U.S. 364 (1968) where the court held that fourth amendment rights apply to offices; Terry v. State of Ohio, 392 U.S. 1 (1968) where people on streets are entitled to same protection as those in their homes.

43. *See* Annot., 97 A.L.R.2d 1302 (1964). Evidence secured by means of a mechanical or electronic eavesdropping device is generally held admissible regardless of other particular factors which may be involved in the case, where it appears that one of the parties to the overheard conversation consented to or co-operated in its interception.

44. May not such "corroborative" evidence be attacked when the agent himself fails to testify, and the government seeks to proffer the recording itself or the

Lopez situation to a case where a policeman was allowed to testify about the contents of a conversation he had heard on the extension phone of a party to the conversation with that party's consent,[45] the majority draws no distinction between third party participation *during* the conversation—where the agent simultaneously transmits the conversation—or *after* it—where the agent records the conversation, a distinction which becomes important in *White*.

The Court has clearly held that the fourth amendment is not violated merely because an undercover informant later divulges the contents of a defendant's conversation to the police, where no electronic device was employed and where the defendant consented to the informer's presence and freely spoke with him, as in *Lewis v. United States*,[46] or within his ear-range, as in *Hoffa v. United States*.[47] This is characterized as a mere "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[48]

This, then, is the context within which *White* came before the Court. *On Lee*, decided nearly twenty years earlier, was factually on point, but its authority had been put into question by the Court's gradual reappraisal and final outright rejection of the trespass doctrine on which the

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testimony of another agent who heard either the recording or a simultaneous transmission of the conversation? The plurality in *White* feels: "No different result should obtain where, as in *On Lee* and the instant case, the informer disappears and is unavailable at trial; for the issue of whether specified events on a certain day violate the Fourth Amendment should not be determined by what later happens to the informer. His unavailability at trial and proffering the testimony of other agents may raise evidentiary problems or pose issues of prosecutorial misconduct with respect to the informer's disappearance, but they do not appear critical to deciding whether prior events invaded the defendant's Fourth Amendment rights." 401 U.S. at 753-54. For further discussion of this point see Comment, *Eavesdropping, Informers, and the Right of Privacy: A Judicial Tightrope*, 52 CORNELL L.Q. 975, 982-84 (1967).

45. Rathbun v. United States, 355 U.S. 107 (1957). This case was decided under § 605 of the Communications Act of 1934, 47 U.S.C. § 605, and indicated that the section did not prohibit the listening in on a telephone conversation when one of the parties consented. *Cf.* Lee v. Florida, 392 U.S. 378 (1968), where petitioner did not consent and did not know that police had hooked up a party line to his phone. *See also* Title III of the Omnibus Crime Control and Safe Streets Act of 1968, § 2510 *et seq.*, 18 U.S.C. § 2510 *et seq.* (1970 ed.), which changed the federal law on wiretapping and eavesdropping by allowing both with *court approval* in the investigation of *certain offenses*. It is interesting to note that the legislature could be considered to have anticipated the final ruling of the Court in *White* since the statutory limitations of Title III do not apply where a party to the wire or oral communication has consented to the interception. 18 U.S.C. § 2511-2(c).

46. 385 U.S. 206 (1966).

47. 385 U.S. 293 (1966).

48. *Id.* at 302.

decision was seemingly based. But perhaps the *Lopez* consent-corroboration formulation could be deemed a viable alternative theory upon which the same result would obtain in such a case—that is, if such a theory could be reconciled with the opinion in *Katz*. Because of the language and scope of the *Katz* decision, based on the broad notions of a right to privacy where one justifiably expects privacy, there existed the possibility that its application would extend to situations even where there was a consent factor involved, as in *Lopez* and *On Lee*, and that such decisions might be re-evaluated in the light of *Katz*.[49]

The precise question presented in *White* thus became whether, according to the criteria expounded in *Katz*, one could "justifiably expect" that, in the absence of a search warrant, his conversation would be private to the extent that it would not be simultaneously transmitted to a third party by the other participant. Or, does one who voluntarily converses with another properly assume the risk not only that his words will be repeated (*Lewis*), or recorded (*Lopez*), but that they will be simultaneously transmitted to some third person with the consent of the other party to the conversation? After the *Katz* decision, and before the Supreme Court decision in *White*, the answer to these questions remained uncertain, as reflected by conflicting views in the lower courts.[50]

THE IMPACT OF THE WHITE DECISION

Justice White, in an opinion joined by Justices Burger, Stewart, and Blackmun, reversed the findings of the lower court and decided that

49. This was especially true in light of the Court's decision in Osborn v. United States, 385 U.S. 323 (1966), a case subsequent to *Lopez* with similar facts, but where the agent recording the conversation was acting under judicial sanction. Instead of summarily disposing of the case with a citation to *Lopez*, the Court presumed that the case raised important fourth amendment issues and upheld the agent's action by virtue of the fact that the agent had received prior judicial authorization. This indicated that the *Lopez* decision might be undergoing a re-evaluation.

50. *See* Handsford v. United States, 390 F.2d 373 (5th Cir. per curiam, J. Fahey dissenting), *cert. denied*, 391 U.S. 915 (1968); Dancy v. United States, 390 F.2d 370 (5th Cir. 1968 J. Fahey dissenting); Long v. United States, 387 F.2d 377 (5th Cir. 1967 per curiam); Dryden v. United States, 391 F.2d 214 (5th Cir. 1968 per curiam); People v. Fiedler, 30 App. Div. 2d 476, 294 N.Y.S.2d 368 (1968 JJ. Goldman and Bastow dissenting), *aff'd without opinion*, 24 N.Y.2d 960, 250 N.E.2d 75 (1969). The latter cases all found *On Lee* viable despite *Katz*, with dissents noted. *Cf.* United States v. Kaufer, 406 F.2d 550 (2d Cir. 1969), *aff'd per curiam* 394 U.S. 458 (1969); Koran v. United States, 408 F.2d 1321 (5th Cir. 1969); Holt v. United States, 404 F.2d 914 (10th Cir. 1968); all containing dicta to the same effect. *Contra*, Doty v. United States, 416 F.2d 887 (10th Cir. 1969), but *rev'd on rehearing*, 416 F.2d 893 (10th Cir. 1969); United States v. Jones, 292 F. Supp. 1001 (D.D.C. 1968), *rev'd on other grounds*, 433 F.2d 1176 (D.C. Cir. 1970).

Katz does not disturb the finding in *On Lee*, reaffirming and relying on the consent factor established in the *Hoffa*, *Lewis*, *Lopez* line of cases to justify *On Lee*'s continued vitality. These Justices, in terms of the principles announced in *Katz*, felt that there was no "justifiable and constitutionally protected expectation that a person with whom [one] is conversing will not *then* or later reveal the conversation to the police [italics mine],"[51] regardless of what one's subjective expectation of privacy may be in such a situation.

> For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant [as the opinion notes was held proper in *Hoffa*], either (1) simultaneously records them with electronic equipment which he is carrying on his person, *Lopez v. United States* . . .; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. *On Lee v. United States* . . . . 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.[52]

Justice White thus had no difficulty in likening the *On Lee-White* situation to *Lopez*, even in view of the "privacy" criteria laid down in *Katz*, since complete reliance on the trustworthiness of another was considered to be an unjustifiable risk. The fact situation in *Katz* could be easily distinguished, since no party to the conversation agreed to the eavesdropping, and the defendant had justifiably relied on the privacy of a telephone booth, not on the good faith of a party to the conversation.[53] The plurality opinion even pointed out language in *On Lee* which indicated that the factor of consent was an alternative and independent ground for the decision in that case.[54]

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51. United States v. White, 401 U.S. 745, 749 (1971).

52. *Id.* at 751.

53. Justice White had already clearly noted this distinction in his concurring opinion in *Katz*. After asserting that *Lopez* and *On Lee* were left undisturbed by the decision in *Katz*, he went on: "When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates." *Supra* note 5, at 363, n. 1.

54. "Petitioner was talking confidentially and indiscreetly with one he trusted, and he was overheard . . . . It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable search or seizure. We find no violation of the Fourth Amendment here." *Supra* note 6, at 753-54. Note that here we are concerned with the informer's consent to allow

The dissenting Justices, Douglas, Harlan, and Marshall, and Justice Brennan, concurring in the result only because of *Desist v. United States*,[55] were not as willing to reconcile consensual third party monitoring with *Katz* or to analogize it to *Lopez*. Justice Harlan deemed the distinction between mere recording by the agent, as in *Lopez* (in which he penned the majority opinion upholding the agent's action), and transmission to a third person a significant one in determining fourth amendment warrant requirements. The difference in the amount of risk the average citizen is subjected to in these two situations forces Justice Harlan to draw the line between them, imposing a warrant requirement where some unknown third ear is simultaneously listening in, regardless of the consent of one of the participants. He feels that the opinion he wrote in *Lopez* in no way reaffirmed *On Lee*, and that it in fact emphasized the absence of any third party intrusion in determining whether the "risk" was fairly assumed by the petitioner.[56]

The basis for Justice Harlan's concern in advocating the imposition of a warrant requirement in the *On Lee—White* situation of simultaneous third party monitoring is grounded in the practical effect which he feels such judicially uncontrolled surveillance would have on the average citizen.

> Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one expected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that spontaneity—reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.[57]

This same social policy consideration would have Justice Douglas impose a warrant requirement in any situation where the government seeks to seize one's private conversation. In fact, as indicated by the first words of his dissent, he feels that "[t]he issue in this case is clouded and concealed by the very discussion of it in legalistic terms. . . . Electronic surveillance is the greatest leveler of human privacy ever known."[58] Since he finds electronic eavesdropping almost certain to stifle free discourse and lead to abuse of civil rights, he would carefully limit it and apply the protections afforded by the fourth amendment. His concern is carefully documented with statements made by various prominent

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the conversation to be monitored. This should not be confused with the *petitioner's* consent to the informer's entry, which was considered in *On Lee* to negate any contention of a physical trespass on the part of the informer. See text *supra*, at 8.

55. *Supra* note 8.

56. 401 U.S. at 776.

57. *Id.* at 787.

58. *Id.* at 756.

political figures, including, in an appendix to his dissent, memoranda written by Franklin Delano Roosevelt and Lyndon Johnson, while serving as President, expressing their reservations about the utilization of eavesdropping and wiretapping by government officials.[59]

Justice Marshall's brief dissent merely indicated that he finds *On Lee* irreconciliable with *Katz*.[60] Justice Brennan, concurring on procedural grounds,[61] would not only extend the fourth amendment to the *On Lee-White* situation, but, reaffirming his dissent in *Lopez,* he finds that case "rationally indistinguishable" and would impose a warrant requirement in that situation also.[62]

The decision in *White* has thus rounded out considerably the criteria with which to analyze most foreseeable electronic bugging situations in determining the necessity of a fourth amendment warrant requirement. *White* has also limited *Katz*'s application to those situations where neither party to a conversation has consented to its seizure. The result is that now, in the absence of any statutory limitations, the police are free to obtain the contents of a private conversation without first securing a warrant, provided they procure the voluntary consent of one party to the conversation, by having the conniving party: (1) Relate to them afterwards what was spoken without the aid of any electronic device, or (2) simultaneously record the conversation and present it to them afterwards, or (3) simultaneously transmit the conversation to them at the time. In those situations where none of the participants consent, the principles enunciated in *Katz* must be applied to determine whether a warrant must be secured.

This result upholds the constitutionality of that part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[63] which excludes consensual third party monitoring from the ambit of the Act's limitations.[64] The decision would in no way affect the constitutionality of

59. *Id.* at 766-68.

60. *Id.* at 795.

61. *Supra* note 8.

62. 401 U.S. at 755.

63. 18 U.S.C. § 2510 *et seq.* (1970 ed.). *See supra* note 45 *et seq.*

64. "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." *Id.* § 2511-2(c) (1970 ed.).

But other questions about the constitutionality of Title III after *Katz* and Berger v. New York, *supra* note 35, remain. *See* Linzer, *Federal Procedure For Court Ordered Electronic Surveillance: Does It Meet the Standards of Berger and Katz,* 60 J. CRIM. L.C. & P.S. 203 (1969); Schwartz, *Legitimation of Electronic*

present state laws permitting electronic eavesdropping, since it has limited rather than broadened the fourth amendment application in such circumstances.[65]

But *Katz* raised many questions, and *White* has answered only one. The future decisions of the Court in the area of electronic surveillance will undoubtedly attempt to resolve some of the other uncertainties engendered by *Katz*. For example, where the factor of consent is not present, and neither party works with the police, under what circumstances the parties to a conversation have *justifiably* expected their words to remain private must still be developed satisfactorily.[66] Problems concerning the adaptability of a warrant to a situation where conversation is sought to be seized, especially those relating to the degree of particularity required and the duration of the warrant's issue, are still to be completely resolved after *Katz* and *Berger v. New York*.[67] Future decisions will also have to cope with a question expressly reserved by the majority opinion in *Katz*, *i.e.*, "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security. . . ."[68]

Eavesdropping: The Politics of "Law and Order," 67 MICH. L. REV. 455 (1969); Weinstein, *Court Order System of Regulating Electronic Eavesdropping Under State Enabling Legislation,* 2 CONN. L. REV. 250 (1969); Comment, *Electronic Surveillance: The New Standards,* 35 BROOKLYN L. REV. 49 (1968); Comment, *Electronic Surveillance by Law Enforcement Officers,* 64 NW. U.L. REV. 63 (1969); Comment, *Wiretapping and Electronic Surveillance—Title III of the Crime Control Act of 1968,* 23 RUTGERS L. REV. 319 (1969); Comment, *Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968: How Do They Stand in Light of Recent Supreme Court Decisions?,* 3 VAL. U.L. REV. 89 (1968).

65. For a survey of state legislation governing electronic eavesdropping *see* Greenawalt, *supra* note 9, at 207-211 and accompanying footnotes; *but see* Weinstein, *supra* note 64, at 250 n. 4, for a list of states which amended their statutes as of August 1969. For discussions on the effect of *Berger* and *Katz* on specific state legislation *see* Michael, *Electronic Surveillance in Illinois,* 1 LOYOLA U. OF CHICAGO L.J. 33 (1970); Comment, *Wiretapping and Eavesdropping in Arizona: A Legislative and Constitutional Analysis,* 9 ARIZ L. REV. 452 (1968); Comment, *Electronic Surveillance in California: A Study in State Legislative Control,* 57 CALIF. L. REV. 1182 (1969); Comment, *Georgia Eavesdropping Statute: A Critical Examination in Light of Berger v. New York,* 2 GA. L. REV. 594 (1968).

66. *See* Kitch, *supra* note 9, at 139-40.

67. *Supra* note 35. *See* articles cited *supra* note 64. *See also* Pitler, *Eavesdropping and Wiretapping—The Aftermath of Katz and Kaiser: A Comment,* 34 BROOKLYN L. REV. 223 (1968); Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition,* 118 U. PA. L. REV. 169 (1969); Comment, *Electronic Eavesdropping Under the Fourth Amendment—After Berger and Katz,* 17 BUFFALO L. REV. 455 (1968); Comment, *Fourth Amendment and Electronic Eavesdropping: Katz v. United States,* 5 HOUSTON L. REV. 990 (1968).

68. 389 U.S. at 358 n. 23.

White has perhaps done more, however, than merely tie one of *Katz*'s loose ends. Although the decision has been logically and legally reconciled with the *Katz* opinion, the major step taken by the Court in *Katz* indicated that a majority of the Court was coming to believe that most, if not all, electronic eavesdropping should at least be limited by a warrant requirement. *White* abruptly halted any such notions. A consideration of the change in membership on the Court should provide a practical clue as to the reason for the Court's failure to extend the principles expressed in *Katz*, and may portend the tenor of the Court's approach in resolving the quagmire yet remaining in the area of electronic surveillance.[69]

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69. Of the seven Justices who concurred in the *Katz* decision, two, Justice Fortas and Chief Justice Warren, have since left. The two new Justices, Blackmun and Chief Justice Burger, notably joined in the plurality opinion in *White* and refused to extend the principles of *Katz*.