A Postscript on *Katz* and Stonewall: Evidence From Justice Stewart's First Draft

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In an article published in this journal in 2008,[1] I suggested that anxieties about homosexuality and its policing lay behind and helped to shape the criminal procedure decisions of the Warren Court — in particular, the landmark Fourth Amendment ruling in *Katz v. United States*.[2] *Katz* is the telephone eavesdropping case in which the Supreme Court famously declared that the Fourth Amendment protects "people, not places"; it is the basis for the modern rule that whether police activity constitutes a "search" under the Fourth Amendment depends on whether it intrudes on a reasonable expectation of privacy, not on whether it involves a physical trespass. I argued in 2008 that when deciding *Katz* at least some of the Justices may have had, in the back in their minds, the then-widespread police practice of spying on men in public toilet stalls to detect homosexual sodomy.[3] *Katz* plainly helped to end that practice. I suggested that this result was one that the Court, or at least some of its members, would have foreseen and welcomed, but that it was not something the Court felt comfortable addressing directly.

When my article was published, the papers of Justice Potter Stewart, the author of the Court's opinion in *Katz*, were still under seal. Pursuant to Justice Stewart's directions they became public with the retirement of the last Justice to have served with Justice Stewart. That

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[1] David Alan Sklansky, *"One Train May Hide Another":* Katz*, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 UC DAVIS L. REV. 875 (2008).

[2] 389 U.S. 347 (1967).

[3] *See* Sklansky, *supra* note 1, at 886-96.

turned out to be Justice Stevens, who stepped down from the Court in 2010.[4] The Stewart Papers include the first draft of what eventually became the Court's opinion in *Katz*, and that draft contains a small bit of additional support for the argument I made three years ago. The new evidence is very far from conclusive, but it seems sufficiently suggestive to warrant this brief postscript.[5]

First some background. Part of the argument in my earlier article had to do with *Smayda v. United States*, a case decided by the United States Court of Appeals for the Ninth Circuit in 1965, a year before it issued the ruling later reversed by the Supreme Court in *Katz*.[6] *Smayda* was a pioneering effort to use the law to protect the rights of gay men; it was litigated by lawyers closely associated with pre-Stonewall "homophile" organizing in San Francisco.[7] The defendants were two men sentenced to six months in jail for having sex in a toilet stall in Yosemite National Park. They were caught late at night by a park ranger spying through a ceiling peephole disguised as an air vent. The defendants' lawyers argued that the surveillance violated the Fourth Amendment, but a divided panel of the Ninth Circuit disagreed, emphasizing that the toilet stall was a "public place" and that, in any event, there had been no "physical invasion" of the stall by law enforcement.[8] The following year, when upholding the telephone eavesdropping in *Katz*, the Ninth Circuit relied on these same principles and cited *Smayda* in support. Because the defendant in *Katz* had been using a public telephone booth, and because there had been no physical trespass into the booth, the Ninth Circuit concluded that the Fourth Amendment was not implicated.[9]

Smayda was a notorious and controversial decision. The law reviews were sharply critical.[10] Moreover, there was a strong dissent in the

[4] *See* Linda Greenhouse, *Down the Memory Hole*, N.Y. TIMES, Oct. 2, 2009, at A31.

[5] The preliminary drafts of Justice Stewart's opinion in *Katz*, along with some inter-chambers memoranda regarding the opinion, are contained in Box 48, Folders 423-25 of the Potter Stewart Papers (MS 1367), Manuscripts and Archives, Yale University Library.

[6] Smayda v. United States, 352 F.2d 251, 253 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).

[7] *See* Sklansky, *supra* note 1, at 889 n.60.

[8] *Smayda*, 352 F.2d at 255-56.

[9] *See* Katz v. United States, 369 F.2d 130, 133 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967).

[10] *See* Comment, *Criminal Law: Unreasonable Visual Observation Held to Violate Fourth Amendment*, 55 MINN. L. REV. 1255, 1259 (1971); Anthony D. Osmundson, Note, *Fourth Amendment Application to Semi-Public Areas:* Smayda v. United States, 17 HASTINGS L.J. 835 (1966); Walter H. Ryland, Comment, *Police Surveillance of Public Toilets*, 23 WASH. & LEE L. REV. 423 (1966).

Ninth Circuit, written by Judge James Browning, who had recently been appointed to the Court following a three-year stint as Clerk of the United States Supreme Court. Closely foreshadowing the reasoning later adopted by the Supreme Court in *Katz*, Judge Browning argued in *Smayda* that "the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances."[11]

The defendants in *Smayda* petitioned for certiorari but were unsuccessful: only Justice Douglas voted to grant review.[12] This result was unsurprising. Throughout the 1960s and 1970s, the Supreme Court conspicuously and intentionally steered clear of the issue of homosexuality.[13] In fact, when political scientist H.W. Perry interviewed Justices and law clerks about the 1976–1980 court terms, homosexuality was the *only* area of public controversy they admitted the Court had purposely avoided.[14] Like Americans more generally, the Justices were uncomfortable with the topic of homosexuality. Like many Americans though, the Justices — or at least some of them — were also uncomfortable with the ways in which homosexuality was policed, including the widespread and heavily criticized practice of spying on men in public toilet stalls.[15]

The *Smayda* case did not escape notice at the Supreme Court. At least three law clerks recommended that the Court take the case because of the important Fourth Amendment issues that it raised.[16] And a few months later, when Justice Douglas dissented in a trio of undercover informant cases, he pointed to *Smayda*, and the men's room spying it condoned, as a troubling indication that "[w]e are rapidly entering the age of no privacy, where everyone is open to surveillance at all times."[17] All of this suggests that the Court may have had *Smayda* and the practice of toilet-stall snooping at the back of its mind when deciding *Katz*. Concerns about the policing of homosexuality were not the principal motivation for *Katz*, but they

[11] *Smayda*, 352 F.2d at 260 (Browning, J., dissenting).

[12] Smayda v. United States, 382 U.S. 981 (1966); *see* Sklansky, *supra* note 1, at 891 & n.74.

[13] *See* Sklansky, *supra* note 1, at 898-99.

[14] See H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 257 (1991).

[15] *See* Sklansky, *supra* note 1, at 900-17.

[16] *See id.* at 891-92. Unfortunately, the Stewart Papers do not include the certiorari memoranda prepared for him before the term beginning in 1973. *See* MANUSCRIPTS AND ARCHIVES, YALE UNIVERSITY LIBRARY, GUIDE TO THE POTTER STEWART PAPERS 6 (rev. ed. 2010).

[17] Osborn v. United States, 385 U.S. 323, 340 (1966) (Douglas, J., dissenting).

operated as kind of suppressed subtext. At least that was what I argued in 2008.

Now for the Stewart Papers. The first draft of the *Katz* opinion that Justice Stewart preserved consists of twenty-one double-spaced, typewritten pages, interleaved with six entirely handwritten pages, some in pencil and some in pen.[18] The typewritten pages also contain handwritten annotations, again some in pencil and some in pen. The handwriting, both on the typewritten pages and on the lined pages, appears to be in the hand of Justice Stewart and the law clerk assigned to the case, Laurence Tribe. For the most part the writing in pen seems to be Tribe's and the writing in pencil appears to be by Justice Stewart.[19] There are some heavy pencil annotations that appear to be in Tribe's hand, but most of the pencil writing is light, and all of the light pencil markings look like Justice Stewart made them. All of the writing by pen seems to be by Tribe. It appears that the typewritten pages were prepared first, presumably by Tribe, and then marked up, first by Justice Stewart and then by Tribe; the handwritten pages seem to have been added during this editing process.

The draft includes the language for which *Katz* is now best known:

> [T]he 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.[20]

[18] The draft is the first document in Box 48, Folder 423 of the Stewart Papers. A photographic reproduction appears as an appendix to the online version of this essay. The Court was initially divided 4–4 in *Katz*, with Justice Stewart voting to affirm and Justice Marshall recusing himself because he had participated in the case while Solicitor General. Justice Stewart evidently asked his colleagues to delay announcement of the result — affirmance by an equally divided Court. Because the opinion that Tribe prepared concluded that the Ninth Circuit had erred, he appears to have couched it as an opinion of the Court, recognizing that if Justice Stewart changed his vote there would now be a majority for reversal. Justice Stewart, though, chose to circulate the first draft as a memorandum in which he spoke only for himself. *See* William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment*, AM. CRIM. L. REV. 1013, 1068-74 (1994); Peter Winn, Katz *and the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 2-3 (2009). Ultimately only Justice Black dissented from the reversal of the Ninth Circuit's decision in *Katz*.

[19] This is Professor Tribe's recollection as well. Email from Laurence Tribe to author (Nov. 14, 2011) (on file with author).

[20] Katz v. United States, 389 U.S. 347, 351 (1967) (citations omitted). Before it

Immediately after that passage, Tribe added the following language by hand: " 'In sum, the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances,' Smayda v. United States, 352 F.2d 251, 260 (dissenting opinion)."

The quotation from Judge Browning's dissent in *Smayda* did not survive. There are light pencil markings, apparently by Justice Stewart, circling the words "such privacy" and suggesting, with a question mark and a proofreader's symbol, that perhaps the entire quotation and citation should be deleted. There are also ink markings, apparently added later by Tribe, crossing out the quotation and citation. The next draft of the opinion in the file does not contain either the quoted language from *Smayda* or any reference to that case, and neither do any of the subsequent drafts.

It is possible that Justice Stewart was uncomfortable relying on an opinion from a sodomy case. But he had other reasons to delete the language from *Smayda*. He was at pains to avoid suggesting in *Katz* that the Constitution recognized a general right to privacy. In fact Justice Stewart added language to Tribe's draft explicitly rejecting that idea:

> . . . I do not believe there is any such thing as a general *Constitutional* "right to privacy." The Fourth Amendment protects against certain specific governmental intrusions upon a person's privacy. But its protections go further, and often have nothing to do with privacy at all. . . . And the protection of a person's *general* right to privacy is, like the protection of the right to his property, and his very life, left to the law of the individual states.[21]

was marked up, the draft appears to have read as follows (again, the citations have been omitted): "What a person knowingly exposes to the public, even in the sanctity of his own home or office, is not entitled to Fourth Amendment protection. But what he seeks to preserve as confidential, even in an area accessible to the public, may be constitutionally protected."

[21] This language later appeared with minor modification in the published opinion for the Court in *Katz*, which provides as follows:

> [T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at al. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's *general* right to privacy — his right to be let alone by other people — is, like the protection of his property and of his very life, left largely to the law of the individual States.

And later in the opinion, where Tribe had written that "the Fourth Amendment secures personal privacy — and not simply 'protected areas,' " Justice Stewart changed the language to read, "the Fourth Amendment protects people — and not simply 'areas.' " So Justice Stewart may have dropped the quotation from the *Smayda* dissent simply because he did not like Judge Browning's suggestion that the Fourth Amendment "protects . . . privacy."[22]

Regardless why the quotation from *Smayda* was cut, though, the first draft of the *Katz* opinion indicates that Justice Stewart and his law clerk were aware of the connections between *Katz* and *Smayda* and that they knew about the reliance that Judge Browning had placed on the expectations of a reasonable person. The draft thus provides additional evidence that *Smayda* was a salient part of the context in which the Court, in *Katz*, shifted Fourth Amendment analysis away from a focus on property and trespass and toward an emphasis on reasonable expectations of privacy — and that the implications of that shift for the policing of homosexuality were unlikely to have come as a surprise.

Id. at 350-51.

[22] Smayda v. United States, 352 F.2d 251, 260 (9th Cir. 1965) (Browning, J., dissenting).

Appendix

Initial draft of Justice Stewart's opinion in *Katz v. United States*

Box 48, Folder 423, Potter Stewart Papers (MS 1367),
Manuscripts and Archives, Yale University Library

~~At the last conference I suggested that announcement of affirmance by an equally divided court be deferred in this case.~~

~~The presently proposed disposition of this case — affirmance by an equally divided vote —~~

In this case ~~written~~ a $300 fine was imposed upon an obviously guilty ~~man~~, ~~and an~~ professional gambler, and ~~thus~~ no injustice will be done ~~by~~ if the conviction is affirmed by an equally divided Court. On the other hand, the case falls in an area ~~in which I think the of great~~ considerable current ~~interest~~ activity and interest ~~activity~~ in ~~the~~ the other two Branches, ~~of and I think the Court it offers at least an opportunity to give constitutional guidance and~~ and an area in which the Court's ~~recent~~ past constitutional guidance has been

somewhat less than ~~above~~ ~~completely~~ surefooted. This case, therefore, offers at least an opportunity ~~to~~ for a clarification of the Court's views ~~whether but I think believe~~

For that reason I have here set down ~~the contours of~~ my views in the ~~hope~~ perhaps unrealistic hope that they may provide the basis for a Court opinion.

(1)

KATZ v. UNITED STATES, No. 35.

Memorandum of MR. JUSTICE STEWART.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute. At trial the government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which the petitioner had placed his calls. In affirming the petitioner's conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment. The court held that no such violation had occurred since because "[t]here was no physical entrance into the area occupied by [the petitioner]." We granted certiorari in order to consider the questions thus presented.

~~In our order~~ The petitioner has (phrased) ~~stated~~ those questions ~~in these terms:~~ as follows:

"A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

"B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

At the threshhold I would reject this formulation of the ~~issues~~. First, I do not believe ~~that~~ (the) solution of Fourth Amendment problems (is necessarily ~~cannot fruitfully be~~ promoted by incantation of the phrase "constitutionally protected ~~area~~." Second, I do not believe there is any such thing as a general constitutional "right to privacy." The Fourth Amendment ~~protects~~ protects individuals against specific governmental intrusions ~~upon~~ into privacy, but its protections go farther, and often have nothing to do with privacy at all.[3a] "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. ... And a person can be just as much, if not more, irritated, annoyed and injured by an uncremonious arrest by a policeman as he is by a seizure in the privacy of his office or home." Griswold v. Connecticut, 381 U.S. 479, 509 (dissenting opinion of Mr. Justice Black).

3a] ~~The~~ The protection of a person's ~~general~~ rights to privacy is, like the

(no new ¶)

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3b 5

3a 4

protection of ~~the right~~ the right to his property and his very life, left to the law of ~~the~~ individual States.[3b] ~~See Time~~ ~~Hill, 38 U.S.~~.

Because of the way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth

3b/ See, e.g., Time, Inc. v. Hill, 385 U.S. 374. Cf. Breard v. Alexandria, 341 U.S. 622; Kovacs v. Cooper, 336 U.S. 77.

KATZ V. U.S.

At the threshhold we must reject this formulation of our problem. In the Court of Appeals and again in this Court the parties have attached great significance to the proper characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that it he that the booth was a "constitutionally protected area." The government has maintained with equal vigor that it was not. [4] In my view, this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" misses the point of the Fourth Amendment. For the Fourth Amendment protects people, not places. people, not places. What a person knowingly exposes to the public, even in the sanctity of his own home or office, is not entitled to a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206; Hoffa v. United States, 385 U.S. 293. But what he seeks to preserve from disclosure, as confidential, as private, even in an area accessible to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253; Ex parte Jackson, 96 U.S. 727, 733. In sum, the Fourth Amendment protects such privacy as a reasonable person would suppose to exist in given circumstances." Smayda v. United States, 352 F. 2d 251, 260 (dissenting opinion).

[4] Here, as in Lewis and Hoffa, we do not deal with the law of arrest under the Fourth Amendment.

(6)

The government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that (he) ~~the petitioner~~ was ~~not~~ as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye - it was the uninvited ear. He did not shed his right to do so simply because he ~~chose to place~~ made his calls from a ~~phone booth in which~~ place where he might be seen. No less than an office in which one conducts his business, 5/ an apartment which one uses ~~with the permission~~ of a friend, or a taxicab in which one rides, 7/ a telephone booth may afford all the ~~essential~~ "attributes of privacy." 8/ One who occupies (it) ~~such a booth~~, shuts the door behind him, and pays the toll which permits him to place a call, is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To ~~suggest~~ read the Fourth Amendment more narrowly ~~contrary~~ is to ignore the ~~central~~ major role that the public telephone has come to play in ~~the world of~~ private communication.

No less than an individual in a business office, 5/ in a friend's apartment, 6/ or in a taxicab, 7/ ~~not~~ ~~may rely upon the protection of the Fourth Amendment.~~ a person in a telephone booth may rely upon the protection of the Fourth Amendment.

(7)

Having decided that the petitioner was entitled to rely upon the privacy of the telephone booth, we must determine whether the surveillance involved in this case can escape the strictures of the Fourth Amendment on the ground that it was unaccompanied by any physical penetration into the booth itself.

Because the petitioner reasonably expected that he would not be overheard, the government's activities in listening to his words and recording them for future use constituted a "search and seizure" within the meaning of the Fourth Amendment. Silverman v. United States, 365 U.S. 505. The government contends, however, that ~~what it did here can escape the strictures~~ the activities of its agents in this case need not meet the standards of the Fourth Amendment, ~~on the ground that there was~~ for the surveillance involved in this case there was no physical penetration of the telephone booth from which the petitioner placed his calls.

New 4

It is true that ~~At one time,~~ the absence of ~~a physical~~ such penetration was at one time thought to foreclose further Fourth Amendment inquiry, ~~into the constitutional validity of a wiretap,~~ Olmstead v. United States, 277 U.S. 438, 457, 464, 465; ~~or of an eavesdrop,~~ Goldman v. United States, 316 U.S. 129, 135, 136. The doctrine enunciated by those cases ~~rested upon the premise that the Fourth Amendment's primary concern was with property; thus only physical invasions of tangible property interests were thought to fall within its scope.~~ was bottomed on the premise that the Fourth Amendment was concerned only with searches and seizures of tangible property. 1/ See Olmstead v. United States, 277 U.S., at 464-466. But "[t]he premise that property interests control the right of the Government to search and seize has been discredited [and we] ~~have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and~~ have increasingly discarded fictional and procedural barriers ~~rested on property concepts.~~" Warden v. Hayden, 387 U.S. 294, 304. Thus, although ~~the~~ a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Fourth Amendment, we have since departed from the narrow ~~recognized more recently that~~ that

Justices Holmes, Brandeis, Stone, and Butler dissented in that case.

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(9) ~~61~~

view on which ~~the holding in Olmstead~~ (it Hutchison / that decision) rested. Indeed, we have expressly held that the ~~protections of the~~ Fourth Amendment (governs only / ~~are not limited to~~ / the seizure of) tangible items, but extends as well to (the recording of) oral statements, overheard without any "technical trespass under ... local property law." Silverman v. United States, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment (protects / ~~secures~~) (people / ~~personal privacy~~) -- and not simply ~~"protected" areas~~ -- against unreasonable search and seizure, it becomes clear that the reach of the Fourth Amendment cannot turn upon the presence or absence of a physical (intrusion into / ~~intrusion of~~) any given enclosure.

I conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The government's activities in electronically listening to the petitioner's words and recording them for future use violated the privacy upon which he justifiably relied while occupying the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with Fourth Amendment standards.

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~~Amendment.~~ In that regard, the government's position is that its agents acted in an entirely reasonable manner. They did not begin their electronic surveillance until ~~a close~~ investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance ~~in here undertaken~~ was ~~confined,~~ limited, both in scope and in duration, to the ~~narrow purpose of establishing~~ specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents ~~limited~~ confined their surveillance to ~~a one-week period~~ the brief periods during which ~~the petitioner made daily use of~~ (the) used the telephone booth, and they took great care ~~not~~ only to transcribe the conversations of ~~anyone~~ other than the petitioner (the petitioner himself.) ~~else.~~ On the single occasion when ~~When~~ the statements of ~~an innocent individual were~~ another person were inadvertently recorded, the agents commendably refrained from listening to them. ~~Thus the agents in this case~~ The agents ~~acted reasonably and, with commendable restraint.~~ ~~Yet the inescapable fact is that the~~ this ~~restraint was imposed by the agents themselves, not by a judicial officer. They acted solely upon their~~

The record shows that

Presumably relying upon this Court's decisions in Olmstead and Goldman

(12)

Given this record, it is clear to me that

~~Indeed~~, the surveillance undertaken here was so narrowly circumscribed that a court (magistrate) properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and (clearly apprised of) the ~~precise scope of the~~ (precise) intrusion it would entail, could constitutionally have authorized the very limited search and seizure that in fact took place.

Only last Term we sustained the validity of such an authorization, holding that, under sufficiently "precise and discriminate circumstances," a federal court may empower (government) agents ~~of the Federal Bureau of Investigation~~ to employ a concealed electronic device for the "narrow and particularized purpose of ascertaining the truth of the ... allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense." Osborn v. United States, 385 U.S. 323, 329 - 330. Discussing that holding, the Court in Berger v. New York, 388 U.S. 41, said that "the order authorizing the use of the electronic device" in Osborn "afforded similar protections to those ... of conventional warrants authorizing the

(13)

seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." Id., at 57. [9] Here too, a judicial order could have accomodated the interest in privacy with "the legitimate needs of law ~~enforcement."~~ [10] enforcement" [10] by authorizing the use of electronic surveillance.

The government urges that, because its agents relied upon the decisions in Olmstead and Goldman, and because they ~~agents~~ did no more here than they might properly have done with prior judicial sanction, ~~this~~ we ~~Court~~ should ~~sustain the validity of~~ retroactively validate their conduct, ~~after the fact~~. It is ~~of course~~ true that the agents in this case, ~~presumably relying upon the decisions in Olmstead and Goldmen,~~ acted with ~~commendable~~ restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They acted solely upon their own estimate of probable cause, untested by the detached judgment of a neutral magistrate. Nor was the scope of their surveillance limited by the terms of a specific court order; it was limited only by the discretion of the officers who conceived

[9] That we cannot do.

carefully limited

its necessity and designed its execution. 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.

(no new ¶) Warrantless searches have been held unlawful "notwithstanding facts unquestionably showing probable cause," Agnello v. United States, 269 U.S. 20, 33, for the Fourth Amendment requires

> "that the deliberate, impartial judgment of a judicial officer ... be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." Wong Sun v. United States, 371 U.S. 471, 481 - 482.

Our decisions leave no doubt that a search conducted without prior judicial approval (by a magistrate as here) cannot survive ~~the~~ unreasonable under the Fourth Amendment 11/ -- unless it falls (subject only) within one of several established exceptions. 12/ (to a few specifically and well delineated)

It is difficult to imagine how any of those exceptions could possibly (ever) apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest could hardly be deemed an "incident" of that arrest. 13/ Nor can could

~~electronic surveillance~~ the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." [14] And of course the very nature of electronic surveillance precludes its ~~validation by~~ (not pursuant to) the suspect's consent. [15]

The government does not question these basic principles. Rather, it urges the creation of a ~~special~~ new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance judicial approval. ~~We~~ (I) cannot agree. The location of a search ~~can have~~ (has) no bearing (whatever) upon the need for prior ~~judicial~~ (judicial) authorization. Omitting such authorization

> "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the ... search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96.

And bypassing a judicial predetermination of the scope ~~of~~ of a search leaves individuals secure from Fourth Amendment violations "only at the discretion of the police." Id., at 97.

These considerations do not vanish when the search in question is transferred from the setting of the home, the office, or the hotel room, to a less private setting of the telephone booth. Wherever a man may be, he is entitled to know that he will remain free from governmental intrusion unless approved in advance by a disinterested magistrate. The government agents in this case ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment," a procedure that must be regarded as "a precondition of lawful electronic surveillance." Because the surveillance employed here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

warrant

Supreme Court of the United States

Memorandum

Insert in n. 4, 19

* Defending the inclusion of a telephone booth in his list, the petitioner cites United States v. Stone, 232 F. Supp. 396, and United States v. Madison, 32 L.W. 2243 (D.C. Ct. Gen. Sess. 1963). Urging that the telephone booth should be excluded, the government finds support in United States v. Borgese, 235 F. Supp. 286.

FOOTNOTES

1./ (18 U.S.C. §1084. That section provides) In pertinent part:

[Quote the section from R. 222, n.1.]

2./ 369 F.2d 130, 134.

3./ 386 U.S. 954. The petition for certiorari also challenged the validity of a warrant authorizing the search of the petitioner's premises. In light of our disposition of this case, I do not reach that issue.

3a/ (See text.) 3b/ (See text)

4./ In support of their respective claims, the parties have compiled competing lists of "protected areas" for our consideration. It appears to be common ground that a private home is such an area, Weeks v. United States, 232 U.S. 383, but that an open field is not. Hester v. United States, 265 U.S. 57. *

5./ Silverthorne Lumber Co. v. United States, 251 U.S. 385.

6./ Jones v. United States, 362 U.S. 257.

7./ Rios v. United States, 364 U.S. 253.

9./ In Osborn v. United States, 385 U.S. 323, this Court rejected a Fourth Amendment challenge to judicially authorized electronic surveillance. Cf. Lopez v. United States, 373 U.S. 427, 446 - 471 (dissenting opinion). Discussing that holding, the Court in Berger v. New York, 388 U.S. 41, said that "the order authorizing the use of the electronic device" employed in Osborn "afforded similar protections to those that are present in the use of conventional warrants authorizing the seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." Id., at 57.

8/ We do not deal here with the law of arrest under the Fourth Amendment.

9/ Although the protections afforded the petitioner in Osborn were "similar ... to those ~~present in the use of~~ ... of conventional warrants," ~~they~~, they were not identical. A conventional ~~search~~ warrant ordinarily serves to notify the suspect ~~that~~ of an intended search, ~~whereas the~~ ~~If such notice had been given to Osborn, if~~ (But if) Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. ~~Thus~~, the (federal) court that authorized

9a/ Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance ~~and recording~~ only during ~~these~~ this predetermined period, ~~for a total of less than twenty minutes.~~ Six recordings, averaging some three minutes each, were obtained and admitted in evidence. ~~They~~ preserved the petitioner's end of ~~the~~ conversations concerning the placing of bets and the receipt of wagering information.

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8/ We do not deal here with the law of arrest under the Fourth Amendment.

9/ Although the protections afforded the petitioner in Osborn were "similar ... to those ~~present in the use of~~ ... of conventional warrants," id., they were not identical. A conventional ~~search~~ warrant ordinarily serves to notify the suspect ~~that~~ of an intended search, ~~whereas the~~ ~~If such notice had been given to Osborn, if~~ (But if) Osborn had been told in advance that federal officers intended to record his conversations, the point of making such recordings would obviously have been lost; the evidence in question could not have been obtained. ~~Thus~~, the (federal) court that authorized electronic surveillance in Osborn ~~omitted any requirement of advance notice, recognizing as has~~ simply recognized, as has this Court, that officers need not announce their purpose before conducting an otherwise authorized search if such an announcement would provoke the escape of the suspect or the destruction of critical evidence. See Ker v. California, 374 U.S. 23, 37 - 41.

In omitting any requirement of advance notice,

Although some have thought that this "exception to the notice requirement where exigent circumstances are present," id., at 39, should be deemed inapplicable where police enter a home before its occupants ~~even~~ are aware that officers are present, id., at 57 (dissen-

ting opinion of MR. JUSTICE BRENNAN), the reasons for such a limitation ~~upon the exception~~ have no bearing here. However true it may be that "[i]nnocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion," id., at 57, and that "the requirement of awareness ... serves to minimize the hazards of the officers' dangerous calling," id., at 57 - 58, these considerations are not relevant to the problems presented by judicially authorized electronic surveillance.

(contd.)

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(iv)

Nor do the ~~notice provisions of the~~ Federal Rules of Criminal Procedure impose an inflexible requirement of prior notice. Rule 41(d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search ~~take place~~ takes place. Nordelli v. United States, 24 F.2d 665, 666 - 667.

Thus the fact that the petitioner in Osborn was unaware that his words were being electronically transcribed did not prevent this Court from sustaining his conviction, and did not prevent the Court in Berger from reaching the conclusion that the limited invasion of privacy sanctioned in Osborn was entirely lawful. 388 U.S., at 57.

9A. (In text) 9B (")

10. A warrantless search may be justified as incidental to a lawful arrest, see Carroll v. United States, 267 U.S. 132, 158, or a lawful seizure, See Cooper v. California, 386 U.S. 58. It may be sustained under circumstances of hot pursuit, Warden v. Hayden, 387 U.S. 294, 298 - 300, or upon a showing of consent. See Stoner v. California, U.S. ~~Massachusetts v. Painten, U.S.~~. There may be "exceptional circumstances," other than those suggested above, "in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a ... warrant for search may be dispensed with. But this is not such a case." Johnson v. United States, 333 U.S. 10, 15.

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10./ Lopez v. United States, 373 U.S. 427, 464 (dissenting opinion of MR. JUSTICE BRENNAN)

11./ United States v. Lefkowitz, 285 U.S. 452, 464; United States v. Jeffers, 342 U.S. 48, 51; Jones v. United States, 357 U.S. 493, 497 - 499; Rios v. United States, 364 U.S. 253, 261; Chapman v. United States, 365 U.S. 610, 613 - 615; Stoner v. California, 376 U.S. 483, 486 - 487.

12./ See, e.g., Carroll v. United States, 267 U.S. 132, 158; Cooper v. California, 386 U.S. 58; Warden v. Hayden, 387 U.S. 294, 298 - 300.

13./ In Agnello v. United States, 269, U.S. 20, 30, the Court stated:

> "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

Whatever one's view of "the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest," United States v. Rabinowitz, 339 U.S. 56, 61; cf. id. at 71 - 79 (dissenting opinion of MR. JUSTICE FRANKFURTER), the concept of an "incidental" search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

14./ Although "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," Warden v. Hayden, 387 U.S. 294, 298 - 299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so frought with urgency.

15./ A search to which an individual consents meets Fourth Amendment requirements, see Stoner v. California, 376 U.S. 483, but of course "the usefulness of electronic surveillance depends on lack of notice to the suspect." Lopez v. United States, 373 U.S. 427, 463 (dissenting opinion of MR. JUSTICE BRENNAN). Cf., n. 9, supra.

~~16. Ohio ex rel. Eaton v. Price, 364 U.S. 263, 272 (separate opinion of MR. JUSTICE BRENNAN).~~

16/ Id., at 464.

~~17. Lopez v. United States, 373 U.S., at 464 (dissenting opinion of MR. JUSTICE BRENNAN).~~ See Osborn v. United States, 385 U.S. 323, 330.

17. ~~We~~ find no merit in the petitioner's suggestion that his indictment must be dismissed. After his conviction was affirmed by the Court of Appeals, ~~the petitioner~~ testified before a federal grand jury concerning the charges ~~on which he had been found guilty.~~ involved here. Because he was compelled to testify pursuant to a grant of immunity, 47 U.S.C. §409(L), he contends that his conviction must be vacated and the charges against him dismissed lest he be subjected to a "penalty ... on account of [a] matter ... concerning which he [was] compelled ... to testify ...." 47 U.S.C. §409(L). Frank v. United States, ~~U.S.App.D.C.~~ 347 F.2d 486. ~~We~~ disagree. In relevant part, §409(L) substantially repeats the language of the Compulsory Testimony Act, 27 Stat. 443, 444 (1893), 49 U.S.C. §46, which was ~~enacted in~~ Congress' response to this Court's statement that an immunity statute can supplant the Fifth Amendment privilege against self-incrimination only if it affords adequate protection from future prosecution or conviction. Counselman v. Hitchcock, 142 U.S. 547, 585 - 586. The ~~immunity statute~~ statutory provision here involved was designed to provide such protection, not to confer immunity from punishment pursuant to a prior prosecution and adjudication of guilt. Cf. Reina v. United States, 364 U.S. 507, 513 - 514.