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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3 See Sklansky, supra note 1, at 886-96.
turned out to be Justice Stevens, who stepped down from the Court in 2010. 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.

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*. *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. 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. 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.

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

The defendants in *Smayda* petitioned for certiorari but were unsuccessful: only Justice Douglas voted to grant review. This result was unsurprising. Throughout the 1960s and 1970s, the Supreme Court conspicuously and intentionally steered clear of the issue of homosexuality. 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. 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.

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. 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.” 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

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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.
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).
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. 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. 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.

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).

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:

[The 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 all. 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.”

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 expressed the view that a prominent and able member of the Board equally divided could not be deprived of his voice.

The Board, however, properly determined on their own initiative an exercise of the power upon the understanding that the decision would be left to the Board.

On this course an appeal from an inferior court to an appellate court is provided for in the Constitution. On the other hand, they are not as to their decision in the Board.

This appeal will, I expect, undoubtedly correct the procedure and injustice in this and the other two branches.

I believe that the Court must, and will, on at least one opportunity to give constitutional guidance to be given and drawn in which the Court's present constitutional guidance has been
Somewhat less than completely supported. This case, therefore, does not present an opportunity for a clarification of the Court's views. For that reason, I have not set down the contours of my views in the hope that they may provide the basis for a Court decision.
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 18 U.S.C. § 108. At trial the government was permitted, over the petitioner’s objection, to introduce evidence of recordings of the petitioner’s end of telephone conversations, overheard by FBI agents who attached an electronic listening and recording device to the outside of the public telephone booth from which the petitioner placed his calls. In affirming the petitioner’s conviction, the Court of Appeals rejected the contention that the recordings obtained in violation of the petitioner’s Fourth Amendment rights. The Ninth Circuit held that no such violation occurred because “[t]here was no physical entrance into the area occupied by [the petitioner].” We granted certiorari in order to consider the important constitutional questions thus presented by the holding.

In that connection, we limited our grant of certiorari to three issues:
In our order

The petitioner has stated those questions in these terms:

"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 threshold I would reject the formulation of the issue. First, I do not believe that formulation is necessary. Fourth Amendment problems can hardly be promoted by incantation of the phrase "constitutionally protected area." Secondly, I do not believe there is any such thing as a general constitutional "right to privacy." The Fourth Amendment protects individuals against specific governmental intrusions into privacy, but its protections go farther, and often have nothing to do with privacy at all. 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 unreasonable 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).

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. See Time Inc. v. Hill, 385 U.S. 347.

Because of the way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth.
At the threshold 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 he that the booth was a "constitutionally protected area." The government has maintained with equal vigor that it was not. In our 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. What a person knowingly exposes to the public, even in the sanctity of his own home, is not 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 as confidential, even in an area accessible only as private, to the public, may be constitutionally protected. See Rios v. United States, 364 U.S. 253; Ex parte Jackson, 96 U.S. 727, 733.
The government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that the petitioner was 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 made his calls from a place where he might be seen. No less than an office in which one conducts his business, an apartment which one uses with the permission of a friend, or a taxicab in which one rides, a telephone booth may afford all the attributes of privacy. One who occupies 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 that the Fourth Amendment (or, as some would have it, the Ninth) was to ignore the central role that the public telephone has come to play in the world of private communication.
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 standards of the Fourth Amendment on the ground that there was no physical penetration into the telephone booth from which the petitioner placed his calls.
At one time, the absence of a physical penetration was thought to foreclose further inquiry into the constitutional validity of a wiretap. Olmstead v. United States, 277 U.S. 438, 457, 464, 465; or of an eavesdropping, 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. 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.” Warden v. Hayden, 387 U.S. 294, 304. Thus, although the Court supposed in Olmstead that surveillance without any trespass and without seizure of any material object fell outside the ambit of the Fourth Amendment, we have recently that departed from the narrow
view on which the holding in Olmstead rested. Indeed, that decision, we have expressly held that the protections of the Fourth Amendment are not limited to tangible items, but extend as well to 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 secures personal privacy -- and not simply "stated 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...
I conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the "trespass" doctrine there announced 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 the petitioner, 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 telephone 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.
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 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 was undertaken both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to a one-week period during which they took great care not to transcribe the conversations of anyone other than the petitioner. On the single occasion when the statements of an innocent individual were inadvertently recorded, the agents refrained from listening to them. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They acted solely upon their
Given this record, it is clear to me that

Indeed, the surveillance undertaken here was so narrowly circumscribed that a court properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and

precisely the scope of the 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 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
seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." Id., at 57. Here too, a judicial order could have accommodated the interest in privacy with "the legitimate needs of law enforcement" 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, we should retroactively validate the conduct, even though it is of course true that the agents in this case acted relying upon the decisions in Gehr Olmstead and Goldman, 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 a specific court order; it was limited only by the discretion of the officers who conceived
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. 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 cannot survive constitutional challenge -- unless it falls within one of several established exceptions. It is difficult to imagine how any of those exceptions could possibly 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 such an arrest. Nor can could
electronic surveillance the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit." And of course the very nature of electronic surveillance precludes its validation by the suspect's consent. The government does not question these basic principles. Rather, it urges the creation of an exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance judicial approval. I cannot agree. The location of a search does have no bearing upon the need for prior 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 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 the less familiar setting of the telephone booth.

Wherever a man may seek privacy, he is entitled to know that he will remain secure from governmental intrusion unless approved in advance by a disinterested magistrate. The government agents in this case ignored "the procedure of antecedent justification... before a magistrate that is central to the Fourth Amendment," a procedure that, we regard in our view, to "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 affirming that conviction must be reversed.

It is so ordered.
18 U.S.C. § 1084. That section provides:

1. Section 1084 provides in pertinent part:

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

2. 369 F.2d 130, 134.

3. 366 U.S. 954. The petition for certiorari also presented questions bearing on 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 those questions.

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. See Silverthorne Lumber Co. v. United States, 251 U.S. 385. Hester v. United States, 265 U.S. 57. See text.

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


9. In Osborne v. United States, 333 U.S. 388, this Court rejected a Fourth Amendment challenge to judicially authorized electronic surveillance. Cf. Jones v. United States, 373 U.S. 417, 446 - 471 (dissenting opinion). Discussing that holding, the Court in Berger v. New York, 335 U.S. 535, 551, said that "the order authorizing the use of the electronic device employed in Osborne "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.
Although the protections afforded the petitioner in Osborn were "similar ... to those ... of conventional warrants," they were not identical. A conventional search warrant ordinarily serves to notify the suspect that of an intended search, whereas if such notice had been given to Osborn, 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 court that authorized

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 one-hour predetermined periods, from 9:30 a.m. to 11:00 a.m. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner's end of conversations concerning the placing of bets and the receipt of wagering information.
Although the protections afforded the petitioner in Osborn were "similar ... to those present in use of conventional warrants," they were not identical. A conventional search warrant ordinarily serves to notify the suspect of an intended search, whereas if such notice had been given to Osborn, 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 court that authorized electronic surveillance in Osborn omitted the requirement ofadvance notice, recognizing 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.

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 are aware that officers are present, id., at 57 (dissent-
[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.

(cont'd.)
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 takes place. Nordell 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.

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, 389 U.S. 571. 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.
10. Lopez v. United States, 373 U.S. 427, 464 (dissenting opinion of Mr. Justice Brennan)


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., 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 fraught with urgency.

15. A search to which an individual consents meets Fourth Amendment requirements, see Stoner v. California, 376 U.S. 943, but of course "the usefulness of electronic surveillance depends on lack of notice to the suspect." Lopez v. United States, 373 U.S. 447, 463 (dissenting opinion of MR. JUSTICE BRENNAN). Cf., n. 9, supra.


17. Id., at 464.

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. 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, 538 U.S. 181, 123 S. Ct. 1524, 347 F.3d 406. 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 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 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.