Chapter 12—
Electronic Surveillance

Introduction

The law on electronic surveillance has changed drastically over the years. In Olmstead v. United States, the Supreme Court said that wiretapping does not violate the Fourth Amendment if there is no trespass into a constitutionally protected area. This enabled the police to conduct legal wiretaps as long as they did not illegally intrude into a person's dwelling.

This rule was changed in *Katz v. United States*, when the Court expressly overruled *Olmstead* and held that any form of electronic surveillance (including wiretapping) that violates a reasonable expectation of privacy constitutes a search under the Fourth Amendment. This means that electronic surveillance is unconstitutional anywhere if it violates a person's reasonable expectation of privacy. Trespass into a dwelling was no longer a requirement; thus electronic surveillance could be illegal, even if done in a public place, if a person has a reasonable expectation of privacy. This change was inevitable because technology had become so sophisticated that surveillance could be conducted without entering a person's dwelling.

The other cases in this section hold that evidence obtained as a result of permission given to the police to listen in on a conversation by a "friend" is admissible as evidence in court. The Court has also held that the use of electronic devices to record or listen to a conversation constitutes a search under the Fourth Amendment; therefore, safeguards are needed in order for the search to be valid. The warrantless use of a homing device in a public place does not constitute a search, but becomes a search if it involves a private residence.

At present, the rules on electronic surveillance are governed strictly by federal and state laws. The main federal law governing electronic surveillance is Title III of the Omnibus Crime Control and Safe Streets Act of 1968. This law is long and complex, but it basically states that law enforcement officers (federal, state, and local) cannot tap or intercept wire communications or use electronic devices to intercept private conversations, except: (1) if there is a court order authorizing the wiretap; or (2) if consent is given by one of the parties. In addition, a court order authorizing the wiretap can be issued only if state law authorizes it, subject to the provisions of Title III of the Omnibus Crime Control and Safe Streets Act. On the other hand, consent given by one of the parties to the conversation may be prohibited by state law. In sum, the police must comply with state and federal laws if they wish to obtain a warrant. Reliance on the cases briefed here can be misleading because these cases do not take into account state law that may further limit, but cannot expand, what the police can do.

The leading cases on electronic surveillance briefed in this chapter are *Berger v. New York* and *Katz v. United States*.

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

CAPSULE: Wiretapping does not violate the Fourth Amendment unless there is a trespass into a "constitutionally protected area." (This case was overruled by *Katz v. United States*, 389 U.S. 347 [1967].)

FACTS: Olmstead and co-conspirators of a huge conglomerate involved in importing and distributing illegal liquor were convicted of conspiracy to violate the National Prohibition Act. Information leading to the arrests was gathered primarily by intercepting messages from the telephones of the conspirators. The information was obtained by placing wiretaps on the telephone lines outside the conspirators' office and homes. The wiretaps were installed without trespass on any property of the conspirators.

ISSUE: Do telephone wiretaps violate the Fourth Amendment protection from illegal searches and seizures? NO.

SUPREME COURT DECISION: Wiretapping does not violate the Fourth Amendment unless there is a trespass into a "constitutionally protected area." (Note: This doctrine was expressly overruled by the Supreme Court in *Katz v. United States*, 389 U.S. 347 [1967].)

REASON: "The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants …"

CASE SIGNIFICANCE: The *Olmstead* case is significant because it represents the old rule on wiretaps. This was the first major case decided by the Court on electronic surveillance and reflects the old concept that evidence obtained through a bugging device placed against a wall to overhear conversation in an adjoining office was admissible because there was no actual trespass. The rule lasted from 1928 to 1967. In 1967, the Court decided *Katz v. United States*, 389 U.S. 347, which held that any form of electronic surveillance (including wiretapping) that violates a reasonable expectation of privacy constitutes a search. Under the new rule, the search may be unreasonable even though no physical trespass occurred.

On Lee v. United States 343 U.S. 747 (1952)

CAPSULE: Evidence obtained as a result of permission given by a "friend" who allowed the police to listen in on a conversation is admissible in court.

FACTS: A federal "undercover agent" who was an old acquaintance and former employee of On Lee entered his laundry wearing a radio transmitter and engaged On Lee in a conversation. Self-incriminating statements made by On Lee at that time and later in another conversation were listened to on a radio receiver by another federal agent located outside the laundry. The conversations were submitted as evidence at On Lee's trial over his objection. He was convicted of conspiring to sell and selling opium.

ISSUE: Is electronic eavesdropping a violation of the Fourth Amendment's protection from unreasonable searches and seizures? NO.

SUPREME COURT DECISION: There is no violation of a suspect's Fourth Amendment right if a "friend" allows the police to listen in on a conversation; hence, the evidence obtained is admissible in court.

REASON: The conduct of the officers in this case did not constitute the kind of search and seizure that is prohibited by the Fourth Amendment. There was no trespass when the undercover agent entered the suspect's place of business, and his subsequent conduct did not render his entry a trespass ab initio (from the beginning). The suspect here claimed that the undercover officer's entrance constituted a trespass because consent was obtained by fraud, and that the other agent was a trespasser because, by means of the radio receiver outside the laundry, the agent overheard what went on inside. The Court, however, rejected these allegations.

CASE SIGNIFICANCE: This case allows the police to obtain evidence against a suspect by bugging or listening to a conversation as long as the police have the permission of one of the parties to the conversation and such practice is not prohibited by state law. The Supreme Court in this case said that the Fourth Amendment does not protect persons against supposed friends who turn out to be police informers. Thus, a person assumes the risk that whatever is said to another person may be reported by that person to the police; there being no police "search" in such cases. It follows that if the supposed "friend" allows the police to listen in on a telephone conversation with a suspect, there is no violation of the suspect's constitutional right. The evidence can be used in court.

Berger v. New York
388 U.S. 41 (1967)

CAPSULE: The use of electronic devices to capture a conversation constitutes a search under the Fourth Amendment, and therefore safeguards are needed in order for the search to be valid.

FACTS: Berger was indicted and convicted of conspiracy to bribe the chairperson of the New York State Liquor Authority. The conviction was based on evidence obtained by eavesdropping. The orders authorizing the placement of the bugs were pursuant to a New York statute on electronic eavesdropping. This statute allowed the Attorney General, a District Attorney, or any police officer above the rank of Sergeant to issue the order. The order must have described who was to be bugged and the general information sought, but it did not require the particular conversation or information to be described. Finally, the order was valid for up to a two-month period with no provisions for halting the search once the specific information was found, and it had no provisions for the return of information gathered.

ISSUE: Did the New York state statute authorizing electronic eavesdropping violate the Fourth Amendment guarantee against unreasonable searches and seizures? YES.

SUPREME COURT DECISION: Electronic devices used to capture a conversation constitute a search under the Fourth Amendment. The New York statute authorizing eavesdropping without describing the particular conversation sought was too broad and did not contain sufficient safeguards against unwarranted invasions of constitutional rights.

REASON: "The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also 'particularly describing the place to be searched, and the person or things to be seized.' New York's statute lacks particularization. It merely says that a warrant may issue on reasonable grounds to believe that evidence of crime may be obtained. It lays down no requirement for particularity in the warrant as to what specific crime has been or is being committed, nor 'the place to be searched,' or 'the person or things to be seized' as specifically required by the Fourth Amendment. The need for particularity and evidence of reliability in the showing required when judicial authorization of a search is sought is especially great in the case of eavesdropping. By its very nature eavesdropping involves an intrusion on privacy that is broad in scope. As was said in *Osborn v. United States*, 385 U.S. 323 (1966), the indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, and imposes a heavier responsibility on the Court in its supervision of the fairness procedures . . ."

CASE SIGNIFICANCE: The *Berger* case was decided in 1967, one year prior to the enactment of Title III of the Omnibus Crime Control and Safe Streets Act. The Court in this case spelled out the six requirements for a state law authorizing electronic surveillance to be constitutionally valid. These are:

1. The warrant must describe with particularity the conversations that are to be overheard;

2. There must be a showing of probable cause to believe that a specific crime has been or is being committed;

3. The wiretap must be for a limited period, although extensions may be obtained by adequate showing;

4. The suspects whose conversations are to be overheard must be named in the judicial order;

5. A return must be made to the court, showing what conversations were intercepted; and

6. The wiretapping must terminate when the desired information has been obtained.

These six requirements have since, in effect, been enacted into law by Title III, along with many other provisions. The Berger case is important in that:

1. It tells us that overly broad eavesdropping statutes are unconstitutional; and

2. It laid out the requirements that state statutes need in order to be valid.

The *Berger* case has since lost some of its value as precedent because of the passage of Title III.

Katz v. United States
389 U.S. 347 (1967)

CAPSULE: Any form of electronic surveillance, including wiretapping, that violates a reasonable expectation of privacy, constitutes a search under the Fourth Amendment. No physical trespass is required. (This case expressly overruled *Olmstead v. United States*, 277 U.S. 438 [1928].)

FACTS: Katz was convicted of transmitting wagering information across state lines. The evidence against Katz consisted of a conversation overheard by FBI

agents who had attached an electronic listening device to the outside of a public telephone booth from which the calls were made.

ISSUE: Is a public telephone booth a constitutionally protected area such that evidence collected by an electronic listening or recording device is obtained in violation of the right to privacy of the user of the booth? YES.

SUPREME COURT DECISION: Any form of electronic surveillance, including wiretapping, that violates a reasonable expectation of privacy, constitutes a search. No physical trespass is required.

REASON: "The government stresses the fact that the telephone booth from which the petitioner made his call was constructed partly of glass, so that he 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 individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that 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 read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication."

CASE SIGNIFICANCE: The *Katz* decision expressly overruled the decision 39 years earlier in *Olmstead v. United States*, 277 U.S. 348 (1928), which held that wiretapping did not violate the Fourth Amendment unless there was some trespass into a "constitutionally protected area." In *Katz*, the Court said that the coverage of the Fourth Amendment does not depend on the presence or absence of a physical intrusion into a given enclosure. The current test is that a search exists, and therefore comes under the Fourth Amendment protection, whenever there is a "reasonable expectation of privacy." The concept that the Constitution "protects people rather than places" is very significant because it makes the protection of the Fourth Amendment "portable," meaning that it is carried by persons wherever they go as long as their behavior and circumstances are such that they are entitled to a reasonable expectation of privacy. This was made clear by the Court when it said that "No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that 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." *Katz*, therefore, has made a significant change in the concept of the right to privacy and has greatly expanded the coverage of that right, particularly as applied to Fourth

Amendment cases. It is the current standard by which the legality of search and seizure cases are tested.

United States v. Karo
468 U.S. 705 (1984)

CAPSULE: The warrantless monitoring of a beeper (homing device) in a private residence violates the Fourth Amendment.

FACTS: Upon learning that Karo and co-conspirators had ordered ether from a government informant, to be used in extracting cocaine from clothing imported into the United States, government agents obtained a court order authorizing the installation of a beeper (a homing device) in one of the cans. With the informant's consent, Drug Enforcement Administration agents substituted one of their cans containing a beeper for one of the cans to be delivered to respondent. Over several months, the beeper enabled the agents to monitor the can's movement to a variety of locations, including several private residences and two commercial storage facilities. Agents obtained a search warrant for one of the homes, relying in part on information derived through the use of the beeper. Based on the evidence obtained during the search, Karo and co-conspirators were arrested and charged with various drug offenses.

ISSUE: Did the monitoring of a beeper without a warrant violate the defendant's Fourth Amendment rights? YES.

SUPREME COURT DECISION: The warrantless monitoring of a beeper in a private residence violates the Fourth Amendment rights of individuals to privacy in their own homes and therefore cannot be conducted without a warrant. (The Court, however, reversed the decision on other grounds.)

REASON: "The monitoring of a beeper in a private residence, a location not opened to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence. Here, if a DEA agent had entered the house in question without a warrant to verify that the ether was in the house, he would have engaged in an unreasonable search within the meaning of the Fourth Amendment. The result is the same where, without a warrant, the government surreptitiously uses a beeper to obtain information that it could not have obtained from outside the curtilage of the house. There is no reason in this case to deviate from the general rule that a search of a house should be conducted pursuant to a warrant."

CASE SIGNIFICANCE: A year earlier, in *United States v. Knotts*, 459 U.S. 817 (1983), the Court held that the use of beepers in a car on a public road by the police does not constitute a search because there is no reasonable expectation of privacy. Moreover, the Court added that the Fourth Amendment

does not prohibit the police from supplementing their sensory faculties with technological aids to help police identify a car's location. The *Karo* and *Knotts* cases were decided differently because their facts were different. In *Knotts*, the agents learned nothing from the beeper that they could not have visually observed, hence there was no Fourth Amendment violation. Moreover, the monitoring in *Knotts* occurred in a public place, whereas the beeper in *Karo* intruded on the privacy of a home. The two cases are, therefore, complementary, not inconsistent, in legal principles.

The Court held in dicta that a warrant for the monitoring of a beeper should contain the:

1. object into which the beeper would be installed,
2. circumstances leading to the request for the beeper, and
3. length of time for which beeper surveillance is requested.

Kyllo v. United States
533 U.S. 27 (2001)

CAPSULE: Using a technological device to explore details of a home that would previously have been unknowable without physical intrusion is a search and is presumptively unreasonable without a warrant.

FACTS: Officers who suspected Kyllo of growing marijuana in his home used a thermal-imaging device to examine the heat radiating from his house. The thermal-imaging device was used from across the street and took only a few minutes. The scan showed that the roof over the garage and a side wall of Kyllo's house were relatively hot compared to the rest of his house and substantially hotter than neighboring homes. Based on this information, utility bills, and tips from informants, officers obtained a search warrant for Kyllo's home. The search revealed more than 100 marijuana plants.

ISSUE: "Whether the use of a thermal imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a search within the meaning of the Fourth Amendment." YES.

SUPREME COURT DECISION: Where the government uses a device that is not in general public use to explore details of the home that would have been unknowable without physical intrusion, the surveillance is a search and is presumptively unreasonable without a warrant.

REASON: "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusions. With few exceptions, the question whether a

warrantless search of a home is reasonable and hence constitutional must be answered no" [Citations omitted]. "We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area constitutes a search, at least where (as here) the technology in question is not in general public use." "On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search."

CASE SIGNIFICANCE: This case addresses the use of thermal imaging devices in law enforcement, an issue of concern in many jurisdictions because of technological advances. The Court describes what thermal imagers do as follows: "Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images."

The government argued that thermal imaging does not constitute a search because: (1) it detects "only heat radiating from the external surface of the house" and therefore there is no entry; and (2) it did not "detect private activities occurring in private areas" because everything that was detected was on the outside. The Court disagreed, concluding that the Fourth Amendment draws "a firm line at the entrance of the house." It conceded that while no significant compromise of the homeowner's privacy occurred in this case, "we must take the long view, from the original meaning of the Fourth Amendment forward." Acknowledging that "it would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology," it nonetheless concluded that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner that will conserve public interest as well as the interest and rights of individual citizens." In sum, there is a limit to electronic surveillance even if it does not directly intrude into individual privacy. The limit here was drawn "when the government uses a device that was not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion."