Tulsa Law Review

Volume 2 | Number 2

1965

Search and Seizure: The Physical Trespass Doctrine and the Adaption of the Fourth Amendment to Modern Technology

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THE "PHYSICAL TRESPASS" DOCTRINE AND THE ADAPTION OF THE FOURTH AMENDMENT TO MODERN TECHNOLOGY.

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. . . . Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[1]

The relevancy of the above statement will become increasingly evident in the months and years to come as the Supreme Court of the United States faces the problems brought about by the application of the fourth amendment[2] to the developments in wire tapping and more recently electronic eavesdropping. Technology, and particularly the developments in this area of electronics were undreamed of by the framers of the Constitution and never posed a real threat to liberty until the turn of the century. These developments bring to the front once again a serious responsibility of the United States Supreme Court, that of balancing the rights of society to be protected on one side, and the rights of the individual to privacy on the other. With these rights in mind, the Court must and will confront and answer the problems posed by these advances of science. In doing this, the Court will again consider the "physical trespass" doctrine first uttered in *Olmstead v. United States*.[3] The question is: has this case, and more particularly its rationale, become outmoded by the developments of modern technology?

The *Olmstead* case, decided in 1928, was the first case in which the Supreme Court heard argument concerning wiretapping. Four federal officers had intercepted the defendant's phone calls. Based upon evidence secured from the intercepted calls, a conviction of conspiracy to violate the National Prohibition Act was secured. The question for the Court was whether the conviction violated the defendant's rights under the fourth and fifth amendments. By a 5-4 decision, over dissents by Justices Holmes and Brandeis, the Court affirmed the conviction.

Chief Justice Taft wrote the majority opinion. The opinion first confined the Court's consideration to the fourth amendment; a study of the fifth amendment was not necessary because the conversations were

[1] Weems v. Hammond, 217 U.S. 349, 373 (1910).

[2] U. S. CONST. amend. IV. The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[3] 277 U.S. 438 (1928).

voluntary and a violation of the fifth depended upon the prior violation of the fourth amendment. Emphasis was placed upon the fact that there was no "physical trespass" and consequently, no illegal search under the fourth amendment. Likewise, the overheard conversations could not be the subject of an illegal seizure. The use of the phone constituted a "projection of the voice" beyond the physical boundaries of the premises, and therefore the fourth amendment was no longer applicable. In essence, a physical entry into the victim's premises was necessary before he could complain that his rights were violated.

Wiretapping was soon regulated to a great extent by Congress, with the passage of the Federal Communications Act of 1934[4] and by the Court in later decisions.[5] However, the "physical trespass" rationale of the majority is still apparent in the later Court decisions dealing with electronic eavesdropping.

In *Goldman v. United States*,[6] federal agents had placed a highly sensitive microphone called a detectaphone against the wall of an office. They were able to hear conversations of Goldman in the office on the other side of the wall. In affirming Goldman's conviction, the Court compared the electronic ear of the detectaphone to an ordinary eavesdropper; and, there having been no physical entry or penetration within the limits of *Olmstead* (which the minority would have overruled), the act was held not to violate the fourth amendment.

The Court again took great pains to explicitly point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment in *On Lee v. United States*.[7] In this case an informer and friend of On Lee had a microphone concealed on his person when he went into defendant's laundry. The microphone transmitted the conversation to a Government agent stationed outside the store. The agent testified against On Lee at his trial. As to the fourth amendment, defendant argued that there was a trespass as the hidden transmitter vitiated the consent of entry, ab inito. The Court found this too technical a theory and refused to apply it. No trespass was committed; the agent went into the petitioner's place of business "with the consent, if not by implied invitation of the petitioner."[8]

While reiterating the "physical trespass" test as an integral element of fourth amendment violations, the rationale of past decisions became further entrenched with a majority of the Court reaching a different result in *Silverman v. United States*.[9] In this case law officers inserted a "spike mike" into a party wall between a house they were using and that occupied by Silverman. The spike made contact with a heating duct and picked up all conversations throughout the house. By a 9-0 vote the

[4] 48 Stat. 1103 (1934), 47 U.S.C. § 605.
[5] Nardone v. United States, 302 U.S. 379 (1937); Nardone v. United States 308 U.S. 338 (1930); Schwartz v. Texas, 344 U.S. 199, (1952); and Benanti v. United States, 355 U.S. 96 (1956).
[6] 316 U.S. 129 (1942).
[7] 343 U.S. 747 (1952).
[8] *Id.* at 751-2.
[9] 365 U.S. 505, (1961).

Court clearly indicated that it would not tolerate the kind of electronic surveillance employed in this case. The Court factually distinguished the *Goldman* detectaphone from the spike mike and found sufficient physical penetration or invasion to render the acts of intrusion a violation of the fourth amendment within the scope of the *Olmstead* decision.

In 1964, the *Silverman* decision was applied by the Court in *Clinton v. Virginia*,[10] a per curiam opinion reversing a state court conviction in which a mechanical listening device had been stuck in the wall. The Court found "that the 'spiked' mike used by the police officers penetrated petitioner's premises sufficiently to be an actual trespass. . . ."[11] The Supreme Court of Appeals of Virginia had attempted to distinguish this case[12] from *Silverman* on the depth of penetration. After discussing the fact that the *Silverman* spike mike was about a foot long and was "inserted" several inches, the Virginia Court reasoned that the mike in this case had been "stuck in." "The penetration was very slight such as one made by a thumb tack."[13] They concluded that this was not "an unauthorized penetration"[14] and therefore there was no violation of the fourth amendment.

Earlier, in *Lopez v. United States*,[15] despite the fact that the Court based its decision upon the conclusion that no eavesdropping had occurred, the Court referred by dicta to some of the same reasoning concerning electronic eavesdropping. The only limitation insisted upon was "that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area."[16] The device in this case had not been planted through the use of any "unlawful physical invasion of petitioner's premises"[17] and hence did not violate the fourth amendment.

By denying certiorari in *Williams v. Ball*,[18] the Court refused to apply the *Mapp v. Ohio*[19] decision to wiretapping. Previous decisions had held that the fourth amendment applied only in federal actions. However, in *Mapp*, the fourth was applied to state as well as federal action through the due process clause of the fourteenth amendment. In denying certiorari it is possible the Court was attempting to give Congress time to act by passing legislation to regulate electronic eavesdropping. This year as in the past, at least one congressional subcommittee is holding hearings and investigating the problems created by electronic eavesdropping. The present subcommittee[20] is primarily concerned with alleged invasions of privacy by federal agencies. Their first goal is to get as complete a picture as possible of government surveillance techniques. Each individual piece of government equipment may be innocent enough in appearance,

[10] 377 U.S. 158 (1964).
[11] *Id.* at 158.
[12] 204 Va. 275, 130 S.E.2d 437, (1963).
[13] *Ibid.*
[14] *Ibid.*
[15] 373 U.S. 427, (1963).
[16] *Id.* at 438-9.
[17] *Id.* at 438-9.
[18] 368 U.S. 990 (1962).
[19] 367 U.S. 643 (1961).
[20] Senate Subcommittee on Administrative Practice and Procedure, Chairman, Senator Edward V. Long (D.—Mo.), February 18, 1965.

but the finished picture may be astounding. The committee is aware of the broad discrepancies between the actual practice of wiretapping, the present wording of the Federal Communication Act and federal and state court decisions construing the act. It is foreseeable that wiretapping will be further regulated when Congress acts by passing legislation to regulate modern eavesdropping. Whether this comes to pass or not the Court is still faced with the "physical trespass" doctrine.

It is difficult to see why the vital policy which underlies the fourth amendment, or the balance between society's right of protection and the individual's right of privacy, which the application of the amendment demands, should be made to turn on such a fortuity as whether the eavesdropping device is placed against the wall as in *Goldman* or inserted into the wall as in *Silverman* and *Clinton.* By basing determinations of constitutional invasions upon actual physical penetration, it appears the Court is grafting a hard fast formula onto the Constitution and more specifically, the fourth amendment. It would seem that instead, the Court should be looking at the basic, underlying liberties which are to be protected.

Justice Brandeis, in writing his dissent in *Olmstead,* warned that the technological advances would continue. In applying Constitutional provisions to these advances, he pointed out that the Court's contemplation cannot be limited to what is and has been, but must also look to what may be. Through new technology, the government would possess means "more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in closets."[21]

This prophetic warning is now a reality. Wire tapping has been perfected to such a high degree that, when skillfully done, it is difficult to detect. "No direct connection with the wires is needed; a small induction coil placed beside them repeats fluctuations of the current, which an amplifier and earphones turn into intelligible sounds."[22] Devices of electronic eavesdropping have been perfected to such an extent that today, with a parabolic microphone, one may listen to a conversation being held in an office across the street.[23] It has been reported that a sonic wave may have been developed which will make it possible to overhear everything said from great distances.[24] The ". . . likely victims [of the eavesdropper, whether they are] — lovers or diplomats, criminals or key executives — can seldom be wholly sure any more that confidential conversations are not being overheard or recorded."[25]

While these scientific advances were being made in wire tapping and electronic eavesdropping, the law lagged behind. It seems quite clear that adequate surveillance (lawful or unlawful) no longer requires an actual trespass upon physical premises. The "physical trespass" test tends, in effect, to treat all the liberties of an individual in an unequal manner. Dissenting in *Silverman,* Justice Douglas pointed out that whether the

[21] 277 U.S. 438, 473.
[22] Time, March 6, 1964, p. 55.
[23] *Supra* note 9, at 508.
[24] *Id.* at 508.
[25] Time, March 6 1964, p. 55.