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Eavesdropping under Court Order and the Constitution: Berger v. New York

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EAVESDROPPING UNDER COURT ORDER AND THE CONSTITUTION: *BERGER v. NEW YORK*[1]

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In a society where the privacy of the individual is being diminished on all fronts, the mushrooming expansion of electronic surveillance is viewed by many as the impending *coup de grace* that could mark the end of individual privacy altogether. Electronic surveillance can assume many forms, but recent advances in technology have brought the form known as electronic eavesdropping to an almost insidious level of sophistication.

Electronic eavesdropping has been defined as embracing all forms of electronic surveillance except wiretapping.[2] Although thirty-six states prohibit wiretapping, only seven proscribe electronic eavesdropping as well.[3] Six of those seven, however, permit "authorized" eavesdropping in some form.[4]

Inadequate statutory control, lax enforcement of existing laws, and the difficult problems of earnest enforcement have combined to create a smorgasbord of surreptitious surveillance in which both government and the private sector busily indulge. The principal opponents in the growing controversy over electronic surveillance are those who condemn such activity by anyone and law enforcement officials who insist that such surveillance is an indispensable tool needed to combat crime, especially organized crime. A recent decision by the nation's highest court reviewed the constitutional questions involved in a state statute permitting electronic surveillance by state officers under court order. In *Berger v. New York*,[5] the Court answered those questions in a manner clearly expanding the privacy of the individual. It declined, however, to characterize official electronic surveillance as unconstitutional per se.

Petitioner Berger was indicted and convicted in the Supreme Court of New York County as a go-between in a conspiracy to bribe the Chairman of the New York State Liquor Authority. Both the indictment and the conviction rested heavily upon evidence which the state secured by "bugging" the offices of two alleged co-conspirators. The "bugging" was effected with recording devices secretly planted in the offices under the authority of separate ex parte orders issued by a New York Supreme Court justice. The New York Code of Criminal Procedure section 813-a provided for an ex parte order for electronic eavesdropping.

> An ex parte order for eavesdropping may be issued by any justice of the supreme court . . . upon oath or affirmation of a district attorney . . . that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations, or discussions are to be overheard or recorded and the purpose thereof. . . . Any such order shall be

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[1]87 S. Ct. 1873 (1967).

[2]Comment, *Eavesdropping Orders and the Fourth Amendment*, 66 COLUM. L. REV. 355, n. 1 (1966).

[3]87 S. Ct. 1873, 1878 nn. 4 & 5 (1967).

[4]*Id.* at 1878.

[5]*Id.*

> effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. . . .[6]

The first order, effective for sixty days, was issued on the basis of information brought to the attention of the district attorney's office by a party claiming he had been harassed by State Liquor Authority agents because he had refused to pay a bribe. The initial "bug" produced information which led the same justice to issue a second order, also effective for sixty days, authorizing the concealment of a recorder in the office of the other alleged conspirator. The conspiracy and petitioner's involvement were uncovered within two weeks. Petitioner objected to the admission of the eavesdropping evidence throughout his trial and subsequent appeals. Both the Appellate Division[7] and the New York Court of Appeals[8] affirmed the conviction without opinion.

The United States Supreme Court granted certiorari and reversed the judgment by a six-to-three margin. In an opinion joined by four other justices, Justice Clark declared that section 813-a on its face violated the fourth amendment, made applicable to the states through the due process clause of the fourteenth amendment.[9] In disposing of the matter on this basis, the majority emphasized that the fundamental purpose of the fourth amendment was "to safeguard the privacy and security of individuals against arbitrary invasions by government officials."[10]

Petitioner Berger had challenged section 813-a as applied in his case, and his challenge of the statute on its face included arguments based on the fifth and ninth amendments as well as the fourth amendment. By permitting the petitioner to challenge the statute on its face, the Court elevated the individual right of privacy under the fourth amendment to that category of basic rights which it seems inclined to most zealously protect against government invasion. As it has done in situations where the rights threatened by a state statute are first amendment rights of free expression,[11] the Court turned directly to section 813-a without pausing to examine its application in this particular case.

The majority held that the provision in section 813-a for the issuance of the eavesdropping order by a judge satisfied the requirement that "a neutral and detached authority be interposed between the police and the public"[12] to weigh the evidence presented by an officer seeking a search warrant. Although New York contended that the "reasonable ground" in section 813-a was intended, and had

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[6]N.Y. CODE CRIM. PROC. § 813-a (McKinney Supp. 1966); this section was amended, N. Y. CODE CRIM. PROC. § 813-a (McKinney Supp. effective Sept. 1, 1967).

[7]25 App. Div. 2d 718, 269 N.Y.S. 2d 368 (1966).

[8]18 N.Y. 2d 638, 272 N.Y.S. 2d 782 (1966).

[9]Mapp v. Ohio, 367 U.S. 643 (1961).

[10]87 S. Ct. 1873, 1880-81 (1967).

[11]*See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940).

[12]Johnson v. United States, 333 U.S. 10 (1948).

been construed by the state courts,[13] to be the equivalent of the "probable cause" requirement of the fourth amendment[14] warrant clause, Justice Clark was reluctant to believe that this language obviated any serious question as to the issue of "probable cause." Since the statute was deemed unconstitutional in other respects, however, Clark did not decide that question.

Section 813-a was found deficient by the majority for failing to require the following:

1) a particular description of the place in which the eavesdropping was to be conducted;

2) a particular description of the nature of the conversations (things) sought to be recorded (seized);

3) a particular description of the crime or crimes sought to be investigated;

4) automatic termination of the eavesdropping authority as soon as the information originally sought had been obtained;

5) a fresh showing of present probable cause to justify an extension or renewal of an eavesdropping order;

6) a showing of some special facts in order to overcome the objection that the eavesdropping, unlike conventional searches, was carried on without notice;

7) a return on the eavesdropping order to limit the officer's discretion as to the use of innocent as well as incriminating conversations.

On the basis of these deficiencies, Clark said the statute authorized a "blanket grant of permission to eavesdrop without adequate judicial supervision or protective procedures."[15]

The majority was not convinced that electronic eavesdropping is as indispensable as most law enforcement officials insist it is. Clark asserted that the requirements of the fourth amendment could not, in any event, be relaxed in the name of law enforcement. Although he believed that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices,"[16] Justice Clark intimated that under proper conditions and circumstances such devices could be used without violating the fourth amendment. The majority, however, thought the New York statute was too similar to the historically condemned general warrant.

Justice Stewart, concurring in the result, agreed that electronic eavesdropping was not unconstitutional per se. However, he did not believe the statute itself was objectionable, resting his vote instead on what he considered to be the insufficiency of the affidavits presented to the justice who issued the order. He asserted that reasonableness under the fourth amendment "demands that the showing of

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[13]People v. Grossman, 45 Misc. 2d 557, 257 N.Y.S. 2d 266 (Sup. Ct. 1966).

[14]U.S. CONST. amend. IV:

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

[15]87 S. Ct. 1873, 1884 (1967).

[16]*Id.* at 1885.

justification match the degree of intrusion."[17] Electronic eavesdropping for sixty days, even of a specified office, was so broad an invasion of a constitutionally protected area that only the "most precise and rigorous standard of probable cause"[18] could justify it.

In another concurring opinion, Justice Douglas branded wiretapping and "bugging" as the greatest of all invasions of privacy. Taking the view that any electronic surveillance which leads to or collects evidence is unconstitutional, he declared that the statute should be struck down simply because it authorized a search for "mere evidence." This contention had been rejected by Clark on the basis of the Court's recent decision in *Warden v. Hayden*,[19] overturning the "mere evidence" rule under which items of an evidentiary nature only could not be seized during a constitutionally valid search. Justice Douglas had dissented in the *Hayden* case, however, finding no meaningful difference between a search for "mere evidence" and the general warrant.

Justice Black in dissent took issue with the majority's interpretation of the protections afforded by the fourth amendment. He insisted that the amendment does not discuss privacy but, rather, is concerned with physical searches for tangible things. Tracing the history of eavesdropping from the early common law, he asserted that these practices, however unsavory, have proved invaluable in combatting crime. Moreover, he said, there was no constitutional ground for excluding the use of evidence seized in contravention of the requirements of the fourth amendment.[20] He criticized the majority for dwelling on the statute itself without adequately examining its application to this particular case. Justice Black agreed with the other dissenters that neither the statute nor its application in this case was objectionable.

Justice Harlan in dissent criticized the Court's decision to permit the petitioner to challenge section 813-a on its face rather than as applied to him. He examined the actual circumstances attending the issuance of the orders and concluded that the overall procedure had violated none of the petitioner's rights. He particularly assailed the majority for disregarding the construction which the New York courts had placed on section 813-a.

Justice White also dissented, concluding that the surveillance practiced in this case had satisfied the requirements of the fourth amendment. He thought the majority had unrealistically discounted the importance of the need for electronic surveillance in combatting crime.

The *Berger* decision represents a significant development in the treatment of official electronic surveillance which the Court began thirty years ago. In *Olmstead v. United States*,[21] the Court examined the constitutional implications of wiretapping for the first time. The petitioners had been convicted of violating a federal act primarily on the basis of evidence obtained through wiretaps of their home and

[17] *Id.* at 1888.
[18] *Id.*
[19] 385 U.S. 926 (1967).
[20] *See* 87 S. Ct. 1873, 1892 nn. 2 & 3 (1967).
[21] 277 U.S. 438 (1928).

office telephones. The wiretaps had been effected without any physical invasion of either the petitioner's homes or their offices. The majority held that liberal construction of the fourth amendment could "not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words 'search and seizure' as to forbid hearing or sight."[22] The Court declared that wiretapping without physical trespass did not constitute a search and that evidence obtained by hearing could not be the subject of a seizure. Under applicable state law wiretapping was a misdemeanor, but the Court held that this fact would not justify exclusion of wiretap evidence in a federal criminal trial.

In *Olmstead*, Justice Holmes argued in dissent that the government ought not to use evidence obtained, and only obtainable, by a criminal act. Noting that in *Weeks v. United States*[23] the Court had ruled evidence obtained by an unconstitutional search and seizure inadmissible in a federal prosecution, Holmes reasoned that evidence obtained by criminal acts of law enforcement officers should also be excluded. Holmes observed that for his part he thought it "less evil that some criminals should escape than that Government should play an ignoble part."[24]

Holmes was not alone in disagreeing with the reasoning and the result reached by the majority. Another eminent jurist, Justice Brandeis, found that the majority's interpretation of the protections afforded by the fourth amendment concentrated on the form of the evil as it existed when the amendment was written rather than on the evil itself. He said that the Constitution gave the individual "the right to be let alone."[25] He stated that every unjustifiable intrusion by the government upon the privacy of the individual should be a violation of the fourth amendment. In implementing that protection, he argued, the Court should be capable of adapting the language to take into account a changing world wherein "[s]ubtler and more far reaching means for invading privacy"[26] continue to develop. He accurately predicted that "the progress of science in furnishing the government with means of espionage is not likely to stop with wiretapping."[27]

The majority in *Olmstead* had suggested that Congress could protect the secrecy of telephone messages by direct legislation. In *Nardone v. United States*,[28] section 605 of the Federal Communications Act of 1934[29] was construed as just such legislation. While many observers believed that section 605 was passed in response to the *Olmstead* holding, the Justice Department argued that it was enacted only as

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[22] *Id.* at 465.
[23] 232 U.S. 383 (1914).
[24] Olmstead v. United States, 277 U.S. 438, 470 (1928).
[25] *Id.* at 478.
[26] *Id.* at 473.
[27] *Id.* at 474.
[28] 302 U.S. 379 (1937).
[29] 47 U.S.C. §605 (1964):

> . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. . . .

an incident to the creation of the Federal Communications Commission and the transfer of jurisdiction over wire and radio communications to that body. Petitioner's conviction for violation of a federal act rested on evidence obtained by wiretaps which federal agents had set up without any physical trespass. The Court held that the statute applied to federal law enforcement agents and that the introduction of an unlawfully intercepted message into evidence in a federal court was prohibited divulgence of that message. Thus, the Court ruled that the direct use of evidence obtained by federal agents in violation of section 605 would not be permitted in a federal court. The parties returned two years later,[30] and the Court ruled that the indirect use of such evidence was proscribed as well. The exclusionary rule thus formulated for evidence obtained in violation of section 605 closely paralleled the exclusionary rule applied to evidence seized in violation of the fourth amendment. Neither kind of evidence could be used, directly or indirectly, in a federal prosecution. The exclusionary rule for evidence seized in violation of the fourth amendment was later extended to state prosecutions;[31] but the case of *Schwartz v. Texas*,[32] holding that wiretap evidence is admissible in the state courts notwithstanding the violation of section 605, has not been overruled.

In *Goldman v. United States*,[33] a detectaphone had been placed against the wall of an office adjacent to that occupied by the petitioner. Federal agents were thus able to overhear conversations of the petitioner with visitors in his office as well as one end of his telephone calls. In affirming a conviction resting on the evidence so obtained, the Court held that the use of the detectaphone involved no trespass or unlawful entry which could justify exclusion of that evidence. It also held that section 605 was directed at protecting the integrity of the communications system itself and, accordingly, the overhearing of one end of a telephone conversation was not an unlawful "interception."

The physical intrusion concept of the eavesdropping problem approached its logical extreme in *Silverman v. United States*.[34] There, a microphone with a one-foot spike had been driven through a party wall separating petitioner's home from an adjoining house in which federal agents were situated. The spike made contact with a heating duct in the petitioner's home thereby setting up a sound-gathering system that enabled the officers to overhear virtually all conversations in the petitioner's home. The conviction was reversed, the Court holding that the evidence on which it rested was obtained by an unlawful physical penetration of the petitioner's home. The Court pointed out that its decision did not depend on whether a technical trespass under local property law had occurred. Rather, it was based on the "reality of an actual intrusion into a constitutionally protected area."[35] The majority maintained the position taken in *Goldman* that overhearing one end of a

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[30]Nardone v. United States, 308 U.S. 338 (1939).
[31]Mapp v. Ohio, 367 U.S. 643 (1961).
[32]344 U.S. 199 (1952).
[33]316 U.S. 129 (1940).
[34]365 U.S. 505 (1961).
[35]*Id.* at 516.

telephone conversation was not an "interception" within the meaning of section 605. Justice Douglas, concurring in the result, failed to see any difference between the *Goldman* and *Silverman* situations. He emphasized that the key issue was the invasion of privacy and that constitutional rights should not be measured in inches.

The *Silverman* case overruled *sub silentio* the majority holding in the *Olmstead* case that conversations could not be the subject of a seizure. In *Wong Sun v. United States,*[36] the Court explicitly held that "the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects'."[37]

The first case in which the court dealt with a carried "bug" was *On Lee v. United States.*[38] An old acquaintance of the petitioner had become a government informant. Equipped with a concealed transmitter, he was sent to discuss the purchase of some narcotics with the petitioner who had been released on bail following an arrest on a narcotics charge. The conversation occurred in petitioner's place of business, and an enforcement agent was stationed outside with a receiver. Petitioner's conviction followed from the agent's testimony as to the statements he had overheard. The government did not call the informant to testify. In affirming the conviction, the Court held that the informant's fraud in gaining entry to the petitioner's business quarters did not make the evidence obtained inadmissible. The doctrine of trespass *ab initio* was viewed as a rule of civil liability that had no bearing on the right of the government to use evidence in a criminal prosecution. The Court found no analogy between an illegal search and seizure and eavesdropping on a conversation with the consent of one of the parties thereto.[39]

Eleven years later, the Court faced a similar situation in *Lopez v. United States.*[40] In that case, a federal tax agent had indicated to the petitioner that his possible liability for past and present cabaret taxes would be investigated. The petitioner proffered money to the agent, intimating that if the agent would "fix things" more money would be forthcoming. After reporting his conversation to his superiors, the agent returned to petitioner's establishment to discuss matters further. This time, however, he carried a concealed recorder. On the basis of both the agent's testimony and the recording, petitioner was convicted of attempting to bribe a federal officer. In affirming the conviction, the Court held that the recording device had only been used to "obtain the most reliable evidence possible of a conversation."[41] The majority noted that the device had not been planted by means of an unlawful physical intrusion nor had it been used to overhear a conversation that could not have been heard otherwise. The Court emphasized that Lopez knew he was talking to a federal agent conducting an official investigation who might later testify against him.

Chief Justice Warren concurred in the result, but he stressed that the decision

[36] 371 U.S. 471 (1963).
[37] *Id.* at 485.
[38] 343 U.S. 747 (1952).
[39] *Id.* at 754.
[40] 373 U.S. 427 (1963).
[41] *Id.* at 439.

should not be taken as a reaffirmance *sub silentio* of the *On Lee* decision. Rather, it was his opinion that *On Lee* should be overruled. He distinguished between the use of a concealed "bug" to corroborate the testimony of a participant to a conversation and its use as a substitute for such testimony. Justice Brennan, joined by Justices Douglas and Goldberg, agreed with the Chief Justice that *On Lee* should be overruled, but he did not view that decision as materially distinguishable from the case before the Court. His dissent regarded electronic surveillance as importing a peculiarly severe danger to personal liberty. While conceding that a person who discloses his private thoughts to another voluntarily assumes the risk that his listener will not keep them in confidence, Brennan insisted that one should not be required to anticipate that his listener is carrying a recorder.

The dissenting justices in *Lopez* expressed dissatisfaction with the overall approach to the problem of electronic surveillance. They called for recognition that such surveillance amounted to a search, irrespective of the presence or absence of a physical intrusion. Brennan reasoned that the fruits of an electronic search should be denied to the government unless the requirements of the fourth amendment had been satisfied. While realizing that the differences between an electronic search and the conventional search raised serious obstacles to the development of a valid warrant for the former, Justice Brennan asserted that it was "premature to conclude that no warrant for an electronic search can possibly be devised."[42]

Under the "physical intrusion" approach to electronic surveillance, an unconsented physical entry into a constitutionally protected area was a necessary concomitant of a search. Electronic surveillance accomplished without such invasion simply was not a search. In the "planted bug" cases, consent was clearly absent and the Court instead pondered whether there had been an actual physical entry. The resolution of this question produced the inconsistency in the *Goldman* and *Silverman* decisions. This inconsistency became even more pronounced when, in *Clinton v. Virginia,*[43] it was indicated that the penetration of a thumbtack could be a sufficient physical invasion.

In the "carried bug" situation, there was an obvious physical entry and the real issue was whether there had been consent. In *On Lee,* the majority had relied on the fact that the petitioner had consented to the presence of a party carrying a concealed transmitter, albeit the consent was given in ignorance of the true purpose of the visit. The majority brushed aside the obvious objection that the consent would never have been given had the petitioner known he would thereby subject himself to electronic surveillance. Perhaps troubled by this, the majority in *Lopez* fortified the finding of consent with the observation that the petitioner knew he was talking to a federal agent who might testify against him later.

A year after the *Lopez* decision, the Court in *Massiah v. United States*[44] encountered a factual situation strikingly similar to that of the *On Lee* case. Petitioner

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[42]*Id.* at 464.
[43]377 U.S. 158 (1964).
[44]377 U.S. 201 (1964).

and an accomplice had been arrested and the latter decided to cooperate with federal agents. The accomplice allowed agents to conceal a transmitter in his car, and he thereafter engaged the petitioner in conversation about the upcoming case while both were sitting in the "bugged" auto. Regular federal agents parked nearby in a receiver-equipped car testified as to incriminating statements by the petitioner which they had overheard. In reversing a conviction based on this testimony, the Court held that the "interrogation" had violated the petitioner's sixth amendment right to counsel.

Although *Massiah* presented an opportunity to squarely uphold or reverse the *On Lee* decision, the Court instead broke new ground by disposing of the case as it did. The Court's thinking as to what the sixth amendment right to counsel actually embraced had no doubt undergone development in the twelve years between *On Lee* and *Massiah*. However, *Massiah* was a splendid case for clarifying important fourth amendment questions, and it was a somewhat imperfect case for treating sixth amendment questions because of the eavesdropping complication. The Court's treatment of *Massiah* strongly suggests that it was becoming dissatisfied with the then prevailing theories applied to the "carried bug" situation. The risk element alluded to in the treatment of the petitioner's consent in *Lopez* held forth the possibility that the finding of "consent" in the "carried bug" cases could become as technical and logically inconsistent as the finding of actual physical entry had already become in the "planted bug" cases. Against this background and with some of its members beginning to regard electronic eavesdropping as a problem which should be handled under the fourth amendment warrant clause, the Court decided *Osborn v. United States*.[45]

In the *Osborn* case, a municipal peace officer had informed federal officers that an attempt might be made to bribe prospective members of a jury being empanelled for a case then pending before a federal district court. After examining an affidavit detailing conversations between the peace officer and Osborn concerning the possibility of bribing the prospective jurors, two federal district judges authorized the use of a concealed pocket recorder to "learn the truth of the allegations." The affiant went to Osborn's office, but the mission failed when the recording came out garbled. After the affiant testified as to the substance of his second discussion with Osborn, the judges issued a second authorization for the use of the eavesdropping device. On the second occasion the device worked well. The recorded incriminating statements, together with the affiant's testimony, were instrumental in convicting Osborn. In affirming the conviction, the Court noted that the eavesdropping order described the conversations sought with particularity, authorized but one limited intrusion, required a fresh showing of probable cause to justify a continuation of the eavesdropping when the first attempt failed, and obligated the officer to make a return on the warrant showing how it was executed and what was seized. These "discriminate and precise procedures" were pointed to with approval by the majority in *Berger*. Justice White, however, criticized the

[45]385 U.S. 323 (1966).

majority for failing to appreciate the analogy between New York's interest in preventing corruption of its high state officials and the interest of the district judges in *Osborn* in preventing the corruption of their court.

Although the majority in *Berger* did not, as Justice Black noted in his dissent, choose to explicitly overrule the *Olmstead* case in toto, the decision in *Berger* represents a substantial abandonment of the *Olmstead* approach to electronic surveillance. The *Olmstead* theory that conversations could not be the subject of an unlawful seizure had been explicitly cast aside in the *Wong Sun* case, and any doubt that might have remained in this respect was removed in *Berger.* The theory that a physical trespass is a necessary element of an unlawful search had been greatly weakened by the Court's willingness in recent years to find a physical intrusion under circumstances where there clearly could be no finding of trespass under local property law. The *Olmstead* treatment of the fourth amendment, affording a limited protection against physical searches and seizures, has been supplanted by the view that the amendment is a reservoir for the protection of individual privacy.

Such an interpretation of the fourth amendment is essential if there is to be meaningful constitutional protection against indiscriminate electronic surveillance by police and other government officials. The "physical intrusion" test is inadequate to deal with even the surveillance of conversation, for devices already exist which can effectively monitor speech from distances which preclude any realistic finding of physical intrusion. Devices designed to monitor activity using visual and infrared techniques are clearly beyond the reach of such a test. The concept of individual privacy, however, is broad enough to protect against unjustified official surveillance in whatever form it takes. The *Osborn* and *Berger* decisions have set the stage for an abandonment of the "physical intrusion" approach to electronic surveillance and the adoption of an approach that recognizes such surveillance as a search which can only be conducted within the framework of the fourth amendment protections of individual privacy.[46]

Although the use of a warrant system would effectively eliminate indiscriminate electronic snooping on the basis of a lack of probable cause, many people advocate a total ban on all electronic surveillance, public or private. On the other hand, the President's Commission on Law Enforcement and the Administration of Justice recently reported: "A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers. . . ."[47] In his dissent in the *Berger* case, Justice Black said that the majority's position made it impossible for the states to have an effective eavesdropping law with which to combat crime. Although the *Berger* decision certainly portends strict construction of such laws, it does not close the door against them. Indeed, four of nine justices considered the New York

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[46]The "physical intrusion" approach was, in fact, discarded in the recent case of Katz v. United States, 88 S. Ct. 507 (1967).

[47]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 200-03 (1967).

statute to be consonant with the requirements of the fourth amendment, and only Justice Douglas seems opposed to the very idea of electronic surveillance.

Legislation pending before the 90th Congress could have a determinative effect on state laws dealing with electronic surveillance. This legislation consists of two major bills, each taking an opposite position on the question of official electronic surveillance. The Right of Privacy Act of 1967[48] would prohibit, except in respect to matters affecting national security, all electronic surveillance without the consent of one of the parties to the conversation. This bill represents the position of the current administration, and it essentially disavows the position taken by the President's Crime Commission.[49] Justice White examined the national security exception critically in the *Berger* case, but his misgivings about it may be obviated if the other position, represented by the Omnibus Crime Control and Safe Streets Act of 1967,[50] prevails. In its current form, the latter bill would permit electronic surveillance by law enforcement officials acting under court order. Presumably, both bills would rely on the broad principles enunciated in *Katzenbach v. Morgan*[51] to make their provisions binding on the states. It is possible that neither bill will be passed, in which event the matter of state law retains significance.

The majority opinion in *Berger,* of its own force and through its approval of the procedures used in *Osborn,* furnishes some guidelines for state legislation permitting limited official surveillance. At the outset, electronic surveillance should be prohibited unless conducted pursuant to a realistic prior authorization process that safeguards against indiscriminate snooping. The issuance of any warrant or other prior authorization should be under the control of "a neutral and detached magistrate," rather than police officials. The issuing magistrate should preside over a court which has jurisdiction to try the crime sought to be investigated. This would assure that he is familiar with the evidence involved in such crimes and, therefore, qualified to weigh the merits of an application. Because of the serious interference with individual privacy inherent in any eavesdropping, its use should extend only to certain major crimes. These crimes should be defined and should include only those as to which such surveillance is ordinarily a substantially valuable investigative tool.

The officer seeking authorization to eavesdrop should be required to provide, under oath, facts showing reasonable grounds to believe that information vital to the solution or prevention of a specific crime can be obtained by such surveillance during a designated time interval. To prevent the use of electronic surveillance as a shortcut to obtain evidence that could, albeit with more difficulty, be gathered by conventional investigative techniques, the officer should also be required to show that the information sought cannot be reasonably obtained without such surveillance. The purpose of these two requirements would be to satisfy the need for a showing of probable cause and to provide the special facts Justice Clark held must

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[48] S. 928 and H.R. 5386, 90th Cong., 1st Sess. (1967).

[49] THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra* note 47, at 200-03.

[50] S. 917 and H.R. 5038, 90th Cong., 1st Sess. (1967).

[51] 384 U.S. 641 (1966).

be present to overcome the lack of notice.

A statute should also require that the person or persons on whom, and the place in which, the surveillance is to be practiced be described with particularity. The kind of evidence sought should be particularly described, but in this respect only the anticipated nature of the conversations sought can be reasonably demanded.

A maximum time for which a surveillance authorization could be granted should be fixed in the statute. Justice Clark indicated that authorization for a 60-day period was equivalent to authority for a series of searches supported by only one showing of probable cause. This analysis seems to rest too heavily on a comparison to the time intervals, seldom exceeding a day, associated with conventional searches. The reasonableness of the authorization period for a search is fundamentally a matter involving the character of the object of the search and the difficulty inherent in finding it. The mere fact that it might take several days, for example, to search a house for a hypodermic tip should not make that search unreasonable because it would only take minutes to search the same house for an anti-tank gun. Evidence in the form of spoken words is of such a fleeting nature that a search for such evidence must necessarily begin a considerable time before that evidence actually comes into being in the place under surveillance. As Justice Harlan points out,[52] moreover, the reasonableness of the authorization time depends on the character of the offense and its complexity in terms of the number of people and transactions associated with it.

Any renewal of the authorization beyond the original period should, however, require another showing of present probable cause. In weighing the case for an extension, the magistrate should consider the success or failure of the initial surveillance. No authorization should be granted for surveillance in regard to one crime when the evidence offered in justification comes from an earlier surveillance in respect to an unrelated crime. This requirement would discourage any dilution of the requirement for probable cause.

Finally, in order to prevent abuse of the authority after it is given, the statute should provide for automatic termination of the authority as soon as the evidence sought is substantially obtained. A procedure should be prescribed whereby the issuing magistrate will be kept apprised of the progress of the surveillance so that he may determine whether its purpose has been served or whether it was improvidently granted and should be terminated early.

It is suggested that any statute authorizing electronic surveillance by court order embody the requirements implicit in the *Berger* decision. These requirements are surely stringent, but, as that case amply demonstrates, vagueness and omission will doom such a statute. Electronic surveillance would then no longer be a tool for generating leads where before there was little more than suspicion. A substantial, independent case would have to be developed before electronic surveillance could be authorized. This necessarily diminishes the utility of such surveillance to law enforcement officials, but it correspondingly strengthens the security of the individual's privacy.

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[52]87 S. Ct. 1873, 1905 (1967).