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Thomas M. Starnes

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Constitutional Law—Search and Seizure—Electronic Listening Devices

In *Olmstead v. United States*,[1] the United States Supreme Court stated that the fourth amendment[2] was not violated "unless there had been an official search and seizure of [a person], or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." In this case the Court held that incriminating telephone conversations obtained by federal officers by tapping the defendant's telephone line were not obtained in violation of the search and seizure clause of the fourth amendment since there had been no *physical* invasion of the defendant's premises.[3] The same rationale was applied and a like result reached in *Goldman v. United States*[4] where the incriminating evidence was obtained by placing a detectaphone against the outer wall of the defendant's office so that police officers could hear conversations inside the office. And in *On Lee v. United States*,[5] incriminating evidence was obtained through the use of a cleverly concealed miniature microphone on an undercover agent who was admitted into the defendant's shop. The incriminating evidence was transmitted through the microphone to another agent outside the shop. The Court held this evidence admissible, stating that this did not amount to an unlawful invasion of individual privacy.

A similar question was presented in the recent case of *Silverman v. United States*.[6] District of Columbia police officers suspected that the defendants were using their row house as headquarters for a gambling operation. After securing permission from the owner, the officers went into an adjoining row house and installed an electronic listening device, a "spike mike," in order to obtain in-

[1] 277 U.S. 438, 466 (1928).

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV.

[3] This case was decided prior to the passage of the Federal Communications Act which provides that "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 communiations. . . ." 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958). The Court has applied this section of the act to prohibit the admission in federal courts of evidence procured by wire-tapping. *E.g.*, Nardone v. United States, 308 U.S. 338 (1939).

[4] 316 U.S. 129 (1942).

[5] 343 U.S. 747 (1952).

[6] 365 U.S. 505 (1961).

criminating evidence. The instrument used was a composite microphone, amplifier, power pack and earphone attached to a one-foot spike. It was inserted into the common wall[7] of the two houses until it struck the heating duct serving the defendants' house. The District Court for the District of Columbia allowed the police officers, over the objections of the defendants, to describe conversations which they had overheard by means of the listening apparatus. The defendants were convicted and the court of appeals affirmed. The Supreme Court reversed.

The Supreme Court refused to re-examine the fine distinction drawn in *Olmstead,* requiring a physical invasion of one's house as the basis for declaring a search and seizure unlawful under the fourth amendment. Instead, the Court based its decision entirely upon the ground that in the instant case "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the [defendants],"[8] and was, therefore, violative of their rights under the fourth amendment to be free from an unreasonable search and seizure.

Although consistent with the rationale of *Olmstead* and its application in *Goldman* and *On Lee,* the significance of the decision in *Silverman* can be fully appreciated only by taking cognizance of the fact that the Court did *not* base its decision on a "technical trespass under the local property law relating to party walls";[9] rather, the "physical penetration" emphasized by the Court was the usurpation of a part of the defendants' house, the heating system, which "became in effect a giant microphone, running through the entire house occupied by the [defendants]."[10] In a concurring opinion, Mr. Justice Douglas stated:

> An electronic device on the outside wall of a house is a permissible invasion of privacy . . . while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other. The concept of "an unauthorized physical penetration into the premises,"

[7] The common wall (or party wall) was thirteen to fourteen inches thick. The defendants argued that the spike penetrated the wall to such a depth that it entered into their half of the wall by as much as five-sixteenths of an inch, hence, a "trespass" in violation of their rights of privacy under the fourth amendment. Silverman v. United States, 275 F.2d 173 (D.C. Cir. 1960).

[8] Silverman v. United States, 365 U.S. 505, 509 (1961).

[9] *Id.* at 511. And see note 8 *supra.*

[10] *Id.* at 509.

> on which the present decision rests seems to me to be beside the point. . . . [O]ur sole concern should be with whether the privacy of the home was invaded.[11]

In seeking to persuade the Court to reconsider its decisions in *Olmstead, Goldman,* and *On Lee,* the defendants brought to its attention various modern electronic devices which could be used to monitor conversations without an actual physical penetration into one's house or office.[12] However, the Court stated that the decision should be based on the the unauthorized physical penetration into the defendant's house and that it need not "contemplate the Fourth Amendment implications of . . . frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."[13]

The Court, by virtue of the peculiar facts of this case, had an opportunity to lay aside a rule of law that has been outmoded by scientific progress and to adhere to the fundamental premise that the principles upon which the fourth amendment is predicated "apply to *all* invasions on the part of the government and its employees of the sanctities of a man's home and the *privacies of life.*"[14] Mr. Justice Brandeis long ago made this observation:

> The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions. *Can it*

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[11] *Id.* at 512 (concurring opinion).

[12] These include a parabolic microphone, reportedly capable of picking up sound from five hundred to one thousand feet away, an ultrasonic microphone that picks up sound from a distance by way of an electronic beam, and a radio microphone that can be "aimed" with a telescope and is capable of sending its microwave beam up to one thousand feet and picking up sound. For the more ambitious eavesdroppers there are closed circuit television outfits. In addition to these highly technical devices there are automatic, remote controlled and telescopic cameras, tiny recorders and a myriad assortment of concealable microphones. For a thorough technical description of the entire gamut of such devices, see DASH, SCHWARTZ & KNOWLTON, THE EAVESDROPPERS, 330-58 (1959).

[13] Silverman v. United States, 365 U.S. 505, 509 (1961).

[14] Boyd v. United States, 116 U.S. 616, 630 (1886) (dictum). (Emphasis added.)

be that the Constitution affords no protection against such invasions of individual security?[15]

It is regretted that the Court in *Silverman* failed to give heed to the warning sounded by Mr. Justice Brandeis. An intrusion by stealth upon individual privacy by police officers should be unlawful under the search and seizure clause of the fourth amendment whether the intrusion be in form of an electronic or microwave beam, a light wave, or a sound wave and regardless of the absence or presence of a "physical invasion."

Indeed, one might even question whether in the principal case the spike's touching the heating duct and thereby transforming it into a sounding board was actually a *physical* invasion of the defendants' house. This is especially so in view of the Court's curt dismissal of technical trespass property law as insignificant. Moreover, there would seem to be little difference between the "usurpation" of the heating system of a house by converting it into a "giant microphone" and simply plucking from the air the sounds within a house by means of an electronic device that may not even touch any part of the house.

Should the Court discard the premise upon which *Olmstead, Goldman, On Lee* and *Silverman* are based, the effect of such a decision would undoubtedly be detrimental to the present practices of police investigations and criminal prosecutions. But, as stated by Mr. Justice Franfurter in a dissenting opinion in *On Lee*,[16] "criminal prosecution is more than a game. And in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by the 'the dirty business' of law officers."

THOMAS M. STARNES

Domestic Relations—Evidence—Presumption of Validity of Second Marriage

It is generally held that where a marriage in fact has been proved or admitted, the law raises a presumption that it is valid.[1] This rule

[15] Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion). (Emphasis added.)

[16] 343 U.S. 747, 758 (1952) (dissent).

[1] *E.g.*, Gee Chee On v. Brownell, 253 F.2d 814 (5th Cir. 1958); Brooms v. Brooms, 151 Cal. App. 2d 343, 311 P.2d 562 (Dist. Ct. App. 1957); Whelan v. Whelan, 346 Ill. App. 445, 105 N.E.2d 314 (1952); Wilson v. Mitchell, 10 Misc. 2d 559, 169 N.Y.S.2d 249 (Sup. Ct. 1957). See generally Annot., 77 A.L.R. 729 (1932); Annot., 34 A.L.R. 464 (1925).