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A strange calm reigns in the United States with respect to the laws governing auditory monitoring by law enforcement authorities. Some may see this as an indication that existing legislation has solved the controversial problems much discussed in the 1960s. However, it seems more likely that the merits of current law are difficult to assess in relation to politically viable alternatives and that advocates of personal privacy will not accept the status quo without further struggle.

The relative calm in the courts is clearly the result of a 1968 comprehensive federal statute that regulates electronic surveillance by both state and federal authorities while forbidding outright nearly all private electronic surveillance.[1] That statute was drafted with considerable technical care in order to forbid constitutionally doubtful activity within its scope.[2] As a result, once *pro forma* challenges to the statute's constitutionality were disposed of, litigation shifted to the less exciting business of contesting whether particular police practices complied with the statute.[3]

Legalistically, what this means is that nearly all questions concerning the requirements of the federal constitution have been mooted and that current litigation is now probing what few doubtful areas can be found in the comprehensive statute. However, this in no way answers the more fundamental question of whether restrictions beyond those required by the constitution and beyond those required by the statute ought to be adopted. It merely indicates that, if the foregoing question is to be answered in the affirmative, the forum in which the struggle for change is most likely to occur is the legislature rather than the courts.

The bases for arguments that the 1968 statute, whatever its

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1. Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. Secs. 2510-20.

2. See Goldsmith, "The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance," 74 J. Crim. L, & Criminology 1, 170 (1983), hereafter referred to a Goldsmith.

3. *Id.* at 56.

technical merits, was a failure in terms of the policy goal of giving adequate protection to personal privacy are numerous. Some arguments are sweeping, such as the assertion that no such surveillance should be authorized, based on the fact that nearly half of the states, including some highly-urbanized ones, have declined to empower their police to do what the federal law permits.[4] However, because drastic proposals are less likely to produce consensus than mild ones, it is appropriate to give emphasis to narrower options. To do this, it is helpful to review the overall legal framework in order to detect the policy options taken, rejected or overlooked in its development.

The most fundamental distinction in this realm is one that poses a fundamental policy question. It is the demarcation between those monitoring activities as to which any constitutional restrictions apply and those that are immune. The applicable provision is the Fourth Amendment, which establishes freedom from unreasonable searches or seizures. This provision, drafted in the Eighteenth Century, is a difficult tool for solution of modern problems, for it requires the drawing of analogies between searches and seizures on the one hand and such activities as wiretapping and bugging on the other. The term "search" is semantically compatible with either a concept limited to physical rummaging or one so broad that it includes scrutinizing someone's facial expression. What has guided the United States Supreme Court in its interpretation of the scope of the Fourth Amendment's protection has been the fact that the constitution lacks any provision against ordinary eavesdropping, a threat the drafters could have anticipated. Thus, activities resembling ordinary eavesdropping were not treated as searches, an approach that led to an early holding that telephone wire-tapping was not covered by the Fourth Amendment.[5] Similar thinking appears to explain the consistent holding that whatever is overheard by a person who is willing to divulge it may be overheard by others, provided the basic overhearing does not involve unlawful behavior, such as trespass. Thus, police are free to pay one's friends to engage one in conversations or sit in on conversations in order to learn of criminal activities and to relay this information to the police.[6] Moreover, this approach regards such monitoring as "consented," allowing it even when the content of conversations is relayed by means of tape recording or radio transmitter.[7]

Exclusion of these activities from Fourth Amendment coverage

4. *Id.* at 163.
5. *Olmstead v. United States*, 277 U.S. 438 (1928).
6. *On Lee v. United States*, 343 U.S. 747 (1952).
7. *Osborn v. United States*, 385 U.S. 323 (1966), involved a tape recorder; *On Lee, supra*, involved a transmitter.

means that evidence thus obtained can be used in criminal prosecutions even though the police acted without any form of judicial oversight and even if there was no probable cause to believe that such activities would yield evidence of a crime. It is essentially unregulated, except for wire-tapping, as to which there have been changes in both decisional and statutory law. Under the system of caselaw precedent it is unlikely that constitutional protection will be extended to these areas, and it must be conceded that the historical progression of decisional law has been relatively coherent and grounded on apparent intent of the framers of the constitution. However, that is not to say that the resulting delineation is satisfactory.

The root of the problem may be reliance on the wording of the Fourth Amendment, with its negative focus on what government may not do, rather than a concept of what is to be protected. The latter approach lacks a grounding in particular words in the constitution, but the Supreme Court has been willing to recognize rights in other contexts despite a lack of explicit constitutional verbiage, as it did in treating personal autonomy in relation to abortion regulation.[8] In any event, there is no reason why legislative initiatives should be deterred by the lack of an express right of privacy in the constitution, particularly when current threats to privacy are far greater and different from those known to the framers of the constitution.

This is true even as to the use of paid informants, for the wisdom of the framers was not informed as to the possibility of ponderous police bureaucracies that can investigate associate after associate until one is found who is open to enticement or threat. It is also true as to simple efforts to overhear spoken words, for police forces large enough to place would-be listeners at numerous locations or sophisticated enough to arrange for their placement in adjoining apartments or offices were unknown in the Eighteenth Century.

The last cases decided by the Supreme Court before passage of the new federal statute seem themselves to reflect discomfort with excessive deference to the wisdom of the constitutional framers, for they demonstrated a desire to depart from the concept of trespass provided by property law in favor of a new concept of invasion of privacy based on justifiable expectations.[9] However, the new statute covers all situations where no participant to a conversation is a police representative and electronic devices are in use, so there have been no significant developments of this new doctrine. On the con-

8. *Roe v. Wade*, 410 U.S. 113 (1973).

9. *Katz v. United States*, 389 U.S. 347 (1967); and *United States v. White*, 401 U.S. 745 (1971).

trary, a state court has held that interception by ordinary radio of conversations over a cordless telephone is beyond the scope of Fourth Amendment protections.[10]

A modern concept of privacy could be sensitive to numerous distinctions not implicated under traditional Fourth Amendment analysis. As to non-trespassory eavesdropping, it could not only take into account whether the situation was one in which the subject under surveillance could expect his conversation to be overheard, but also the likelihood that anyone overhearing it would be a police officer or paid police representative. This could lead to protection for a park-bench conversation where the police had fielded a host of listeners to be near a subject wherever he might choose to hold his conversation. That is, it could take into account the likelihood that the police would make such extraordinary efforts, which is proportional to the cause to believe that such efforts would yield evidence of a crime. An extraordinary effort without adequate cause would be an unjustifiable fishing expedition regardless of any chance evidence turned up.

As to the doctrine of consent, a modern theory of privacy could consider both timing and method of inducing someone to be an informer. A distinction might be drawn between those who gain a subject's confidence while they are in the pay of a law enforcement organization and those who do so before becoming paid informers. Although the Supreme Court has so far reasoned that one must always run the risk of betrayal by an associate, it would seem that betrayal by an informant of the former kind is more easily classed as an inevitable risk than the latter, for the latter kind of informant has undergone an unknown change of motivation, one prompted by police efforts that are unexpectable except when police have probable cause to believe that compromising such an associate of a subject would lead to evidence of a crime. In contrast, those who become associates while already under police employ have a consistent motivation that a subject may more fairly be said to be at risk of detecting.

Modes of inducement may also be relevant, for betrayals induced by offers of money may be anticipated when one has knowledge of an associate's character and may they be occasioned by rivals in crime as well as the police. However, even the most loyal associate may be turned into an informant under the threat of prosecution for a crime unknown to the subject, and although a blackmail threat from a rival in crime could conceivably have a similar result, it could

10. *State v. Delaurier*, 37 Crim. L. Reptr. 2004, R.I. Sup. Ct. No. 84-76-C.A., Feb. 21, 1985.

also lead to a disclosure by the associate to the subject and a joint effort to neutralize the blackmailer.

The common thread in both timing and modes of inducement is that while one runs risks of disloyalty on the part of associates, such risks are greater when the motive for their disloyalty causes them to behave in ways that are contrary to what prior evidence would indicate and are due to distinctive motivations.

Similar sensitivity could lead to improvements in unconsented electronic surveillance, which is covered by the federal statute. Such monitoring activities, including trespassory eavesdropping—or eavesdropping that disappoints justifiable expectations of privacy, under the analytical framework suggested by the Supreme Court before the legislation intervened—was regarded as illegal unless authorized by a judicial warrant issued upon a showing of probable cause that it would yield evidence of a crime and in conformity with procedural requirements.[11] Under the federal statute, all such monitoring is forbidden unless specifically authorized by statute, and all authorized monitoring is subject to the warrant requirement described above, plus further constraints, including restrictions as to which officials may authorize such monitoring and a requirement that there be a showing that alternative means have been determined to be ineffective.[12] Moreover, monitoring is permitted only with respect to a limited class of crimes.[13] Finally, the statute attempts to impose requirements as to the conversations to be monitored and the duration of monitoring efforts.[14]

These restrictions prevent clashes with constitutional limits under traditional Fourth Amendment analysis, but whether they meet the needs of contemporary notions of privacy in relation to contemporary methods of surveillance is another matter. For example, once the statute's requirements are met, an electronic bug may be placed in a given room to detect whatever conversations occur there. These may include conversations with persons the police had no prior reason to suspect of criminal behavior and concern crimes the police had no reason to suspect the designated subject was involved in. In such a case a crime may be detected as to which the police had no probable cause to believe that their monitoring would detect. Whether to confer standing upon this unexpected conversationalist to challenge the legality of the monitoring that led to its detection poses an issue that the courts have found the federal statute

11. *Berger v. New York*, 388 U.S. 41 (1967).
12. 18 U.S.C. 2518(3).
13. 18 U.S.C. 2516.
14. 18 U.S.C. 2518(4) and (5).

inadequate to resolve.[15]

Moreover, lawful monitoring activity may incidentally detect information of noncriminal activities of a nature that the parties to the conversation would prefer to keep private, ranging from romantic involvements to political strategies, and the act provides little or no protection from revelation of such information by police personnel, for most such police activities are immune from damages suits.[16] Requirements that warrants be specific as to conversations to be intercepted or as to their content have been set by statute or proposed, but their effectiveness under realistic circumstances has been doubtful,[17] so that interception of innocent conversations seems inevitable.

This suggests first that adequate damages should be available for revelation of innocent conversations and that measures to deter such revelations, such as fines personally aimed at police agents, should be considered. It also suggests that non-consensual monitoring should be limited to as great an extent as possible, due to this danger of compromising non-criminal secrets.

The last-mentioned conclusion is also indicated by the difficulty of assuring specificity as to conversations and content to be intercepted, for this suggests that interception of non-criminal conversations is inevitable. Moreover, it is also indicated by the vagaries of the chief remedy for violations of the statute—or of the Fourth Amendment—suppression of evidence at criminal trials.[18] This is now mandated by statute,[19] but its efficacy is open to question, for although the statute itself mandates that all subjects of surveillance be informed of the fact of such surveillance shortly after it ceases, there is no requirement that all persons who conversed over the tapped telephone or in the "bugged" premises be given such notice.[20] As a result, there is a danger that police may use evidence that was discovered by virtue of conversations overheard under the statute to obtain convictions of persons whose criminality was discovered by accident. Use of evidence thus obtained would seem to be forbidden under the "fruit of the poisonous tree" doctrine, which calls for exclusion of all evidence discovered through intrusive, unconsented surveillance except in accordance with warrant requirements of

15. *United States v. Kahn*, 415 U.S. 143 (1974). See Goldsmith, *supra* note 2 at 56-120, and J. Albanese, JUSTICE, PRIVACY, AND CRIME CONTROL 10-12 (1984).

16. See Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis," in PRESIDENT'S CRIME COMMISSION TASK FORCE REPORT: ORGANIZED CRIME, 81, 92-93 (1969), reprinted in THE PROBLEMS OF ELECTRONIC EAVESDROPPING 20 (M. Paulsen ed. 1977).

17. Goldsmith, *supra*, at 56 et seq.

18. *Lee v. Florida*, 392 U.S. 378 (1968).

19. 18 U.S.C. 2515; *United States v. Chavez*, 416 U.S. 562 (1974).

20. 18 U.S.C. 2518(8)(d).

probable cause and specificity as to targets of scrutiny,[21] but such protection is illusory unless monitored persons are aware that their conversations have been monitored.

Two problems with the federal statute that are technical in nature but of great practical significance should also be noted. The first is that its provision covering emergency surveillance, for which after-the-fact warrants may be obtained, is rather too broad. In addition to national security matters, it applies to "activities characteristic of organized crime," and that wording is vague enough to cover many situations not requiring urgent action.[22] Until 1984, it also was too narrow, lack a provision to cover situations where a human life hangs in the balance, as where police know an individual has planted a bomb but not where or when it will explode. However, this has been remedied.[23]

The second technical weakness is an inherent and pervasive one: the statute is crucially dependent on strict judicial enforcement for its protections to be effective. There is reason to believe that enforcement in the lower courts has been less than stringent, and Supreme Court decisions have paved the way for dilution of some of the statute's restrictions.[24]

In view of the issues outlined above, the lack of burning issues in the courts or of pending legislative proposals should not be presumed to indicate that problems with audio surveillance have been solved in the United States. What has been solved is a technical legal problem of keeping such surveillance within the bounds of constitutional limitations that are grounded in Eighteenth Century thinking. The question of what further restrictions may be appropriate to protect contemporary values of privacy from contemporary techniques of surveillance has not been given a definitive answer.

The federal statute regulating unconsented electronic surveillance addresses only those matters which posed the greatest analytical problems under the traditional approach. By giving a wide berth to traditional prohibitions, it has the appearance of a compromise between those who would have forbidden no more than the constitution forbade and those who would have maximized protection of privacy, but its ability to serve as an enduring compromise is open to doubt.

The statute's limited scope leaves the above issues concerning consented and non-electronic monitoring subject only to restrictions imposed by an antiquated approach. Moreover, its capacity to pro-

21. *Alderman v. United States*, 394 U.S. 165 (1969).
22. Goldsmith, *supra*, at 48.
23. P.L. 98-473, Ch. XII, Part B. The number of crimes for which electronic surveillance may be authorized was expanded, as well.
24. Goldsmith, *supra*, at 56.

tect privacy within its scope of operation is crucially dependent upon practical enforcement, and enforcement has not been impressively rigorous. Thus, the degree to which privacy is sacrificed under the statute may be found to be greater in practice than the statute's wording would suggest.

The overall balance between law enforcement needs and privacy needs may also be influenced by a perception that law enforcement needs in this realm are not as great as anticipated, for the enhancement of law enforcement under the federal statute has not been great. As a result, the statute's chief function may be to serve as a vehicle for acquiring greater experience concerning the interplay between law enforcement interest and privacy interest.

Thus, the current calm in this area of law may be due in part to the need to accumulate sufficient data to permit development of persuasive hypotheses concerning relative utility of intrusive law enforcement behavior. Then, the struggle may be rejoined.