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Application of the Fourth Amendment to Pen Register Surveillance - No Justifiable Expectation of Privacy: Smith v. Maryland

Les Brannon

NOTES

Application of the Fourth Amendment to Pen Register Surveillance—No Justifiable Expectation of Privacy: Smith v. Maryland

Michael Lee Smith was suspected of robbing Patricia McDonough and subsequently annoying her with a series of obscene and threatening phone calls. Without obtaining a warrant or court order, the police instructed the telephone company to install a pen register[1] to record the telephone numbers dialed from Smith's private residential telephone. After being installed and in service for one day, the pen register tape indicated that a call had been placed[2] from Smith's home to McDonough's home. Based on this and other evidence,[3] police obtained a warrant and searched Smith's home, seizing a phone book with a page turned down to McDonough's name and telephone number. Smith was subsequently arrested, identified in a line-up by McDonough, and indicted. Smith's pretrial motion to suppress the pen register tape[4] and the evidence derived from it[5] was denied

1. A pen register is a device attached to a given telephone line, usually at a central telephone office. A pulsation of the dial on the line to which the pen register is attached records on a paper tape dashes equal in number to the number dialed. The paper tape thus becomes a permanent and complete record of outgoing numbers called on the particular line. After the number is dialed on outgoing calls, the pen register cuts off without determining whether the call is completed or the receiver answered. There is neither recording nor monitoring of the conversation. With reference to incoming calls, the pen register records only a dash for each ring of the telephone but does not identify the number from which the incoming call originated. United States v. Caplan, 255 F. Supp. 805, 807 (E.D. Mich. 1966). The number 341 would appear on a pen register tape as --- ---- -. Claerhout, *The Pen Register*, 20 DRAKE L. REV. 108, 110 (1970); *see* United States v. New York Tel. Co., 434 U.S. 159, 161 n.1 (1977); Note, *The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool*, 60 CORNELL L. REV. 1028, 1028 n.3 (1975).

2. The Court did not expressly state that Michael Lee Smith placed the call. Throughout its opinion, however, the Court referred to "the phone numbers he [petitioner] dialed."

3. The other evidence consisted of tape recordings that McDonough had made, without police assistance, of conversations with the anonymous caller. Smith v. State, 283 Md. 156, 389 A.2d 858, 859 (1978).

4. The basis for the motion to suppress was the exclusionary rule. Pursuant to the exclusionary rule, evidence obtained in a manner violative of an individual's constitutional rights may not be used against the individual in certain criminal proceedings. *See* C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE 1-47 (1978). The Court established the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914), but made the rule applicable only to the federal government and its agencies. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court, on the basis of the fourteenth amendment, extended application of the rule to the states. *See* J. HANLEY & W. SCHMIDT, LEGAL ASPECTS OF CRIMINAL EVIDENCE § 4.2 (1977); M. SLOUGH, PRIVACY, FREEDOM AND RESPONSIBILITY 143-46 (1969); McKay, *Mapp v. Ohio, The Exclusionary Rule and The Right of Privacy*, 15 ARIZ. L. REV. 327, 332-34 (1973); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141, 144-45 (1978).

5. Smith sought to exclude this evidence based on the "fruit of the posionous tree" doctrine. This doctrine, which first appeared in Nardone v. United States, 308 U.S. 338, 341

on the basis that the installation of the pen register without a warrant did not violate the fourth amendment.[6] Smith was convicted and sentenced to six years' imprisonment. On appeal, the Court of Appeals of Maryland affirmed the conviction, holding that the use of the pen register was not a search within the meaning of the fourth amendment and therefore no warrant to install the pen register was necessary.[7] The United States Supreme Court granted certiorari in order to resolve indications of conflict between the decided cases as to restrictions imposed by the fourth amendment on the use of pen registers. *Held, affirmed*: The installation and use of a pen register, at police request, upon telephone company property is not a search within the meaning of the fourth amendment, and hence, no warrant is required. *Smith v. Maryland*, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979).

I. THE DEVELOPMENT OF FOURTH AMENDMENT LIMITATIONS ON WIRETAPPING AND ELECTRONIC SURVEILLANCE

The fourth amendment bars the government from conducting unreasonable searches and seizures.[8] The threshold question, therefore, in considering whether the fourth amendment has been violated by a particular governmental activity[9] is whether a search or seizure has taken place.[10]

(1939), provides generally that evidence derived from unlawfully obtained information is inadmissible in a criminal prosecution. *See* 3 W. LAFAVE, SEARCH AND SEIZURE—A TREATISE ON THE FOURTH AMENDMENT § 11.4 (1978). Smith claimed that the installation of the pen register was unlawful and that all the information derived from the pen register therefore should be excluded. Smith v. State, 283 Md. 156, 389 A.2d 858, 860 (1978). *See* Jones, *Fruit of the Poisonous Tree*, 9 S. TEX. L.J. 16 (1967). Other evidence that Smith sought to exclude was the line-up identification and the telephone directory with the marked page. Smith v. State, 283 Md. 156, 389 A.2d 858, 860 (1978). The motion for suppression of the line-up identification was withdrawn before the trial court ruled on it. *Id.*

6. The fourth amendment provides:

> 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.

U.S. CONST. amend. IV.

7. Smith v. State, 283 Md. 156, 389 A.2d 858 (1978).

8. U.S. CONST. amend. IV.

9. The fourth amendment applies only to governmental action. Searches by private parties are not within its scope. *See* Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971); Burdeau v. McDowell, 256 U.S. 465, 475 (1921); United States v. McGuire, 381 F.2d 306, 312 (3d Cir. 1967), *cert. denied*, 389 U.S. 1053 (1968); People v. Horman, 22 N.Y.2d 378, 239 N.E.2d 625, 292 N.Y.S.2d 874 (1968), *cert. denied*, 393 U.S. 1057 (1969). *See also* Camara v. Municipal Court, 387 U.S. 523 (1967) (activities of administrative officials such as safety, health, and fire inspectors are within the scope of the fourth amendment).

Usually a pen register is installed pursuant to a request by the police or some other governmental authority. The telephone company thus becomes an agent of the governmental authority and its actions are deemed to be the actions of the government. Hence, the requirement of governmental action is satisfied. *See* Corngold v. United States, 367 F.2d 1 (9th Cir. 1966); People v. McKinnon, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972); Machlan v. State, 248 Ind. 218, 225 N.E.2d 762 (1967); State v. Holliday, 169 N.W.2d 768 (Iowa 1969). *But see* Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 256 n.3 (9th Cir. 1977) (mere cooperation between the telephone company and the local police is not sufficient to establish the requisite state action).

10. If a search or seizure is anticipated, the government offical must procure a warrant

Basic to this inquiry is the fundamental principle that the constitutional protection granted by the fourth amendment against unreasonable searches and seizures is to be liberally construed[11] in favor of the individual[12] in order that the right of privacy may remain unviolated[13] and free from encroachments.[14]

In its early decisions, the United States Supreme Court defined a search as requiring a physical trespass[15] into a constitutionally protected area.[16] Thus, eavesdropping on a conversation with the aid of a spike mike inserted into a party wall of an adjoining house violated the fourth amendment,[17] whereas eavesdropping on a conversation with the aid of a

in advance. A search without a warrant is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). A warrant can only be issued by a neutral and detached magistrate based on a sworn affidavit containing facts sufficient to establish probable cause. Johnson v. United States, 333 U.S. 10 (1948). Probable cause exists when a man of reasonable caution would be warranted, based on the facts and circumstances, in believing that the location to be searched contains seizable objects. *See* Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925). *See generally* 2 W. LAFAVE, *supra* note 5, §§ 4.1-.13; C. TORCIA, 4 WHARTON'S CRIMINAL EVIDENCE §§ 719-721 (13th ed. 1973); C. WHITEBREAD, *supra* note 4, at 47-55 (1978).

There are several exceptions to the requirement for a warrant. *See* United States v. Ramsey, 431 U.S. 606 (1977) (border searches); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (consent searches); Coolidge v. New Hampshire, 403 U.S. 443 (1971) ("plain view" doctrine); Terry v. Ohio, 392 U.S. 1 (1968) ("stop and frisk" doctrine); Warden v. Hayden, 387 U.S. 294 (1967) ("hot pursuit" theory); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception—exigent circumstances). For a discussion of warrantless searches, see W. LAFAVE, *supra* note 5, §§ 4.1-10.11.

11. Boyd v. United States, 116 U.S. 616, 635 (1886).

12. Sgro v. United States, 287 U.S. 206 (1932).

13. United States v. Lefkowitz, 285 U.S. 452 (1932).

14. In Boyd v. United States, 116 U.S. 616, 635 (1886), the Court stated: "[I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."

15. Olmstead v. United States, 277 U.S. 438, 466 (1928). The requirement for a physical trespass as an element of a search became known as the trespass doctrine. *See* Silverman v. United States, 365 U.S. 505 (1961); On Lee v. United States, 343 U.S. 747 (1952); Goldman v. United States, 316 U.S. 129 (1942). *See also* United States v. White, 401 U.S. 745 (1971); Desist v. United States, 394 U.S. 244 (1969).

16. Berger v. New York, 388 U.S. 41, 47, 59 (1967); Lopez v. United States, 373 U.S. 427, 438-39 (1963); Silverman v. United States, 365 U.S. 505, 510, 512 (1961); On Lee v. United States, 343 U.S. 747, 752-53 (1952). The constitutionally protected areas recognized by the Supreme Court were based on the protected areas expressly enumerated in the fourth amendment. "Persons" included clothing, Beck v. Ohio, 379 U.S. 89 (1964), and bodies, Schmerber v. California, 384 U.S. 757 (1966); "houses" included stores, Amos v. United States, 255 U.S. 313 (1921), business offices, United States v. Lefkowitz, 285 U.S. 452 (1932), apartments, Clinton v. Virginia, 377 U.S. 158 (1964), hotel rooms, Stoner v. California, 376 U.S. 483 (1964), garages, Taylor v. United States, 286 U.S. 1 (1932), and warehouses, See v. City of Seattle, 387 U.S. 541 (1967); "papers" included letters, *Ex parte* Jackson, 96 U.S. 727 (1877); "effects" included, among other things, automobiles, Preston v. United States, 376 U.S. 364 (1964). *See* 1 W. LAFAVE, *supra* note 5, § 2.1(a), at 223-24.

17. Silverman v. United States, 365 U.S. 505 (1961). Even though the *Silverman* decision rested squarely on the trespass doctrine, it signalled the Court's uneasiness with the analysis behind that doctrine, and laid the foundation for the Court's landmark decision in Katz v. United States, 389 U.S. 347 (1967). In *Silverman* the court stated, "We find no

detectaphone placed against a wall of an adjoining office did not.[18] The Court also defined a seizure to include the seizure of tangible material effects[19] and to exclude the overhearing of words.[20] Thus, a conversation overheard by the use of a wiretap could not be seized within the meaning of the fourth amendment because of the intangible nature of words.[21]

In the 1967 case of *Katz v. United States*[22] the Supreme Court discarded its earlier conceptions of what constituted a search and seizure. In *Katz* FBI agents had overheard incriminating statements of the defendant Katz by attaching an electronic listening and recording device to the outside of a public telephone booth and monitoring Katz's calls.[23] The statements were introduced, over objection, in the trial at which Katz was convicted. The Supreme Court reversed the verdict, holding that the statements should have been excluded because they were obtained through a violation of Katz's rights under the fourth amendment.[24] The Court rejected the trespass doctrine[25] and the constitutionally protected area analysis[26] in determining that Katz's conversation had been searched and seized by the FBI agents. Whether the electronic device penetrated the phone booth[27] was constitutionally insignificant, the Court said, because "the Fourth Amendment protects people, not places."[28] Accordingly, a search and seizure took place when the government "violated the privacy upon which [Katz] justifiably relied."[29]

Justice Harlan, in a concurring opinion, attempted to explain his interpretation of the majority's opinion.[30] Justice Harlan set forth a two-part test for determining whether a search and seizure occurs within the meaning of the fourth amendment.[31] First, a person must exhibit an actual sub-

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occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch." 365 U.S. at 512.

18. Goldman v. United States, 316 U.S. 129 (1942).

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

20. *Id; see* On Lee v. United States, 343 U.S. 747 (1952).

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

22. 389 U.S. 347 (1967).

23. Only Katz's side of the conversation was recorded. Katz was charged with transmitting wagering information by telephone in violation of 18 U.S.C. § 1084 (1976).

24. 389 U.S. at 359.

25. *Id.* at 353; *see* note 15 *supra*.

26. The arguments advanced by both parties centered upon whether the telephone booth was a constitutionally protected area. In rejecting this formulation of the issue, the Court stated that "the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area.'" 389 U.S. at 350; *see* Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 357 (1974).

27. The government had argued under the trespass doctrine that the fourth amendment was inapplicable because the device was attached to but did not penetrate the phone booth. *See* Silverman v. United States, 365 U.S. 505 (1961).

28. 389 U.S. at 351-52.

29. *Id.* at 353.

30. *Id.* at 360-62.

31. The Court has never formally adopted Justice Harlan's two-part test. The Court, however, has frequently cited that test, thus implicitly embracing it as the proper *Katz* analysis. Smith v. Maryland, 99 S. Ct. 2577, 2580, 61 L. Ed. 2d 220, 226-27 (1979); United States v. Chadwick, 433 U.S. 1, 7 (1977); United States v. Miller, 425 U.S. 435, 442 (1976); Terry v. Ohio, 392 U.S. 1, 9 (1968).

jective expectation of privacy.[32] Secondly, the individual's expectation must be one that society is prepared to recognize as reasonable.[33] In attempting to interpret and apply the *Katz* decision, the Supreme Court and the lower courts have often relied on Justice Harlan's concurring opinion.[34]

The *Katz* decision changed the focus of all subsequent fourth amendment search and seizure inquiries. No longer would the courts mechanically apply the physical trespass and constitutionally protected area tests. Instead, the courts would search for the more elusive bounds of a person's privacy right.[35]

II. PEN REGISTERS AND THE FOURTH AMENDMENT

Whether the use of a pen register constitutes a search or seizure within the meaning of the fourth amendment is an issue that has divided the lower federal courts. The controversy has stemmed chiefly from a statement by Justice Powell that "[b]ecause a pen register device is not subject to the provisions of Title III [of the Omnibus Crime Control and Safe Streets Act of 1968], the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment."[36] Several courts, in dicta, interpreted Justice Powell's words as indicating that the fourth amendment would

32. 389 U.S. at 361.

33. *Id.*

34. The term "expectation" that appears in Justice Harlan's concurrence was not used in the majority's opinion, however. Justice Harlan's use of that term has caused some commentators to view his analysis as necessitating an inquiry foreign to the analysis in the majority opinion. Professor Amsterdam has stated that the majority opinion would protect Katz's conversation because he justifiably relied upon its being protected, not in terms of an actual subjective expectation, but in the sense of a claim of right. Therefore, Justice Harlan's inquiry into an individual's subjective expectations of privacy has no place "in either the holding of *Katz* or in a statement of what is protected by the fourth amendment." "[N]either *Katz* nor the fourth amendment asks what we expect of the government. They tell us what we should demand of the government." Amsterdam, *supra* note 26, at 384. Another author has stated that an inquiry into an individual's actual subjective expectation of privacy "distorts and unduly limits the rule of the *Katz* case." 1 W. LAFAVE, *supra* note 5, § 2.1(c), at 230. The importance of the distinction between Justice Harlan's analysis and the majority's analysis arises primarily in the consideration of whether certain governmental actions may define and limit the scope of fourth amendment protection by merely diminishing an individual's actual subjective expectation of privacy. *See* note 83 *infra* and accompanying text.

35. Amsterdam, *supra* note 26, at 383; *see* 1 W. LAFAVE, *supra* note 5, § 2.1, at 228; Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133; Note, *The Reasonable Expectation of Privacy—Katz v. United States, A Postscriptum*, 9 IND. L. REV. 469 (1976).

36. United States v. Giordano, 416 U.S. 505, 553-54 (1974) (Powell, J., concurring in part and dissenting in part) (footnote omitted). The majority opinion in *Giordano* did not reach the issue of the application of the fourth amendment to the pen register. Rather, the pen register evidence was excluded as evidence derived from an unlawfully issued wiretap order under title III, 18 U.S.C.A. §§ 2515, 2516(1), 2518(10)(a)(1) (1970 & Supp. 1979).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. §§ 2510-2520 (1970 & Supp. 1979) was Congress's attempt to comprehensively regulate electronic surveillance. A Senate Report accompanying the Act stated that a pen register was a permissible form of surveillance under the Act because the Act was "intended to protect the

govern the propriety of pen register use.[37] In addition, the Second Circuit squarely held that the use of a pen register was subject to the requirements of the fourth amendment.[38] The Ninth Circuit, on the other hand, reached a different conclusion in *Hodge v. Mountain States Telephone & Telegraph Co.*[39] Using a *Katz* analysis,[40] the court refused to place fourth amendment restrictions on pen register records. The court analogized to telephone company billing records in concluding that there is no expectation of privacy in pen register records because of the public awareness that such records are maintained.[41]

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privacy of the communication itself and not the means of communication." S. REP. NO. 1097, 90th Cong., 2d Sess. 90 (1968).

In United States v. Giordano, 416 U.S. 505, 553 (1974) (Powell, J., concurring in part and dissenting in part), Justice Powell stated that the "pen register device is not subject to the provisions of Title III." Consequently, most lower federal courts considering the matter held that pen register use was not governed by title III. Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977); Application of United States for Order Authorizing Installation and Use of Pen Register, 546 F.2d 243 (8th Cir. 1976), *cert. denied*, 434 U.S. 1008 (1977); Application of United States *in re* Order Authorizing Use of Pen Register, 538 F.2d 956 (2d Cir. 1976), *rev'd on other grounds sub nom.* United States v. New York Tel. Co., 434 U.S. 159 (1977); United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976); United States v. Schaefer, 510 F.2d 1307 (8th Cir.), *cert. denied*, 421 U.S. 975 (1975); United States v. Clegg, 509 F.2d 605 (5th Cir. 1975); United States v. John, 508 F.2d 1134 (8th Cir. 1975); *In re* Joyce, 506 F.2d 373 (5th Cir. 1975); United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975); United States v. Finn, 502 F.2d 938 (7th Cir. 1974); United States v. Brick, 502 F.2d 219 (8th Cir. 1974); Korman v. United States, 486 F.2d 926 (7th Cir. 1973); United States v. DeLeeuw, 368 F. Supp. 426 (E.D. Wis. 1974); United States v. Best, 363 F. Supp. 11 (S.D. Ga. 1973); United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971), *aff'd in part, rev'd in part*, 478 F.2d 494 (9th Cir.), *cert. denied*, 414 U.S. 846 (1973); *In re* Alperen, 355 F. Supp. 372 (D. Mass.), *aff'd sub nom.* United States v. Doe, 478 F.2d 194 (1st Cir. 1973); United States v. Lanza, 341 F. Supp. 405 (M.D. Fla. 1972); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970); United States v. Vega, 52 F.R.D. 503 (E.D.N.Y. 1971). The only exception to this line of decisions was Application of United States for Order Authorizing Use of Pen Register Device, 407 F. Supp. 398 (W.D. Mo. 1976), which, in holding that the authorization and use of a pen register was governed by title III, relied upon the "comprehensive" language of the statute rather than the "doubtful" language of the Senate Report.

When the issue finally presented itself to the United States Supreme Court in United States v. New York Tel. Co., 434 U.S. 159 (1977), the Court had little difficulty in holding that "[b]oth the language of the statute and its legislative history established beyond any doubt that pen registers are not governed by Title III." *Id.* at 166.

37. United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976); United States v. John, 508 F.2d 1134 (8th Cir.), *cert. denied*, 421 U.S. 962 (1975); United States v. Doolittle, 507 F.2d 1368 (5th Cir.), *cert. dismissed*, 423 U.S. 1008 (1975); United States v. Brick, 502 F.2d 219 (8th Cir. 1974). *See also* Application of United States for Order Authorizing Installation and Use of Pen Register, 546 F.2d 243 (8th Cir. 1976), *cert. denied*, 434 U.S. 1008 (1977); Application of United States for Order Authorizing Use of Pen Register Device, 407 F. Supp. 398 (W.D. Mo. 1976); State v. Ramirez, 351 A.2d 566 (Del. Super. Ct. 1976).

38. Application of United States *in re* Order Authorizing Use of Pen Register, 538 F.2d 956 (2d Cir. 1976), *rev'd on other grounds sub nom.* United States v. New York Tel. Co., 434 U.S. 159 (1977). In so holding, the Court relied primarily on Justice Powell's statement in *Giordano* and on the Seventh Circuit's dictum in United States v. Illinois Bell Tel. Co., 531 F.2d 809, 812-13 (7th Cir. 1976).

39. 555 F.2d 254 (9th Cir. 1977).

40. *See* notes 22-35 *supra* and accompanying text.

41. 555 F.2d at 256. The telephone company billing records had previously been recognized by the Ninth Circuit as lacking fourth amendment protection because of the general public awareness that such records are routinely maintained, thus negating any expectation of privacy. United States v. Baxter, 492 F.2d 150 (9th Cir. 1973), *cert. denied*, 414 U.S. 801

III. SMITH V. MARYLAND

The split of authority among the lower courts led the Supreme Court to grant certiorari in *Smith v. Maryland* in order to confront the issue of whether the use of a pen register without a warrant is a search or a seizure within the meaning of the fourth amendment.[42] The Court approached the issue with a straightforward application of the analysis in *Katz*[43] as interpreted by Justice Harlan.[44] In order to apply *Katz*, however, the Court first needed to determine precisely what capabilities a pen register has.[45] The pen register, the Court noted, is an instrument that records only the numbers that have been dialed, and not whether the calls have been completed. The identities of the caller and the recipient of the call[46] remain private, as do the contents of the conversation.[47] Consequently, any

(1974); United States v. Fithian, 452 F.2d 505 (9th Cir. 1971). In noting that pen register records are not as routinely maintained as billing records are, the court in *Hodge* stated that the distinction was more than offset by the fact that pen register records, unlike billing records, do not disclose whether the call has been completed, and are thus even further removed from the content of the conversation. Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254 (9th Cir. 1977).

42. The Justices split 5-3 in their decision. Justice Powell did not participate in the decision. Justice Powell's separate opinion in United States v. Giordano, 416 U.S. 505 (1974) (Powell, J., concurring in part and dissenting in part), was the opinion that had become the foundation for the holdings or dicta of lower courts that the fourth amendment was applicable to pen registers. Thus, a 5-4 decision might have resulted had Justice Powell participated. *See* notes 38-39 *supra* and accompanying text.

43. *See* notes 22-29 *supra* and accompanying text.

44. *See* notes 30-33 *supra* and accompanying text.

45. In determining the nature of the challenged activity, the Court relied primarily on the language of United States v. New York Tel. Co., 434 U.S. 159, 167 (1977). In *New York Telephone*, which dealt solely with the applicability of title III to pen registers, the Court stated that the language of title III indicates that pen registers do not "intercept" information because they do not acquire the "contents" of a communication as defined by the Act. *Id.* at 167. *See* 18 U.S.C. § 2510(8) (1976). By relying on *New York Telephone* in the present case, the Court evidently assumed that the threshold standards for determining the applicability of fourth amendment proscriptions to pen registers are the same threshold standards that are used to determine the applicability of a statutory enactment to pen registers. The Court failed to consider whether Congress was actually legislating with the fourth amendment in mind, or whether Congress framed the proscriptions of title III apart from constitutional considerations.

46. Justice Marshall assumed that the identity of the recipient of the call might be disclosed by the pen register. 99 S. Ct. at 2586, 61 L. Ed. 2d at 234; *see* note 88 *infra* and accompanying text.

47. Justice Stewart's disagreement with the majority is primarily on this point. Justice Stewart argues that there is content in the numbers dialed. *See* note 74 *infra* and accompanying text. *See also* Smith v. State, 283 Md. 156, 389 A.2d 858 (1978) (Cole, J., dissenting) (stating that information can be conveyed by nonverbal action). Some courts have suggested that communication might occur through code-calling, a prearranged signal accomplished by dialing at a certain time or allowing the telephone to ring a certain number of times. United States v. Dote, 371 F.2d 176 (7th Cir. 1966); United States v. Caplan, 255 F. Supp. 805 (E.D. Mich. 1966); United States v. Guglielmo, 345 F. Supp. 534 (N.D. Ill. 1965), *aff'd*, 371 F.2d 176 (7th Cir. 1966).

The Court, in its benign description of the capabilities of the pen register, overlooked the potential for abuse of such surveillance. *See* Smith v. State, 283 Md. 156, 389 A.2d 858, 874 n.4 (1978) (Cole, J., dissenting) (pen register surveillance may be converted to a wiretap by attaching a tape recorder or headphones to appropriate terminals on the unit); Brief for Appellant at 10, United States v. Illinois Bell Tel. Co., 531 F.2d 809 (7th Cir. 1976) (some pen registers contain a voice-actuated switch that will automatically turn a tape recorder on

claim to privacy by petitioner Smith would be vested solely in the numbers dialed.[48]

The Court, applying the first part of Justice Harlan's *Katz* analysis,[49] sought to determine whether Smith had exhibited an actual, subjective expectation of privacy. The Court doubted that people in general have any actual expectation of privacy in the telephone numbers they dial, reasoning that all telephone users know that the numbers they dial are conveyed to telephone company switching equipment and that the telephone company can record the numbers dialed because users see a list of their long-distance calls in their monthly bills.[50] Furthermore, most telephone books inform customers that the telephone company has the facilities to help identify annoyance calls. The Court found it "too much to believe"[51] that people actually expect the numbers they dial to remain private.[52]

Based on its perception of the public's expectations in general, the Court found that Smith could not have had an actual expectation of privacy in dialing McDonough's number.[53] The Court rejected the argument that Smith had demonstrated this expectation of privacy by using his home telephone. The use of his private residential telephone might manifest the petitioner's expectation that the contents of his conversation would remain private. Such use could not, however, demonstrate an expectation to keep private the number dialed because, regardless of where the petitioner called from,[54] he had to convey the number he dialed to the telephone company in order to complete his call.[55]

In considering the second part of the *Katz* analysis, the Court concluded that, even if Smith had demonstrated a subjective expectation of privacy, society was not prepared to recognize that expectation as reasonable.[56] This conclusion is based upon the principle that a person has no legitimate expectation of privacy in the information he voluntarily gives to third par-

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and off). *See also In re* Joyce, 506 F.2d 373, 377 n.4 (5th Cir. 1975). One commentator noted that Congress, in not including the pen register within the proscriptions of title III, might not have appreciated the potential for pen register abuse. Note, *Circumventing Title III, The Use of Pen Register Surveillance in Law Enforcement*, 1977 DUKE L.J. 751, 759.

48. Even though *Katz* overruled both *Olmstead* and *Goldman*, the Court in *Smith* indicated that had there been a physical trespass into a constitutionally protected area, the focus of the inquiry into the applicability of fourth amendment protection would have been different. 99 S. Ct. at 2580-81, 61 L. Ed. 2d at 227; *see* notes 15-29 *supra* and accompanying text. *See also* Katz v. United States, 389 U.S. 347, 351-53 (1967).

49. Katz v. United States, 389 U.S. 347, 361 (1967).

50. 99 S. Ct. at 2581, 61 L. Ed. 2d at 227-28.

51. *Id.*

52. *See* note 78 *infra* and accompanying text. *But see* Hodge v. Mountain States Tel. & Tel. Co., 555 F.2d 254, 261 (9th Cir. 1977) (Hufstedler, J., concurring) (merely because pen register may be used by telephone company for internal purposes does not mean that fourth amendment would permit use of pen register to investigate crime that is unrelated to delivery of telephone service).

53. 99 S. Ct. at 2581, 61 L. Ed. 2d at 228-29.

54. *But see* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), in which Justice Harlan stated: "Thus a man's home is, for most purposes, a place where he expects privacy."

55. 99 S. Ct. at 2581, 61 L. Ed. 2d at 228-29.

56. *Id.* at 2582, 61 L. Ed. 2d at 229.

ties.[57] Under such circumstances, a person assumes the risk of disclosure.[58] The Court analogized Smith's conduct to the bank depositor's conduct in *United States v. Miller*.[59] Even as the bank depositor voluntarily revealed financial information to the bank, and thus took the risk that the bank would reveal it to the government, so Smith voluntarily conveyed McDonough's phone number to the telephone company and thus took the risk that the telephone company would convey that information to the government.[60] In assuming this risk of disclosure, any expectation of privacy in that information became unreasonable.[61]

Finally, the Court rejected the petitioner's argument that his expectation of privacy was one society would recognize as reasonable because the numbers were conveyed to electronic switching equipment rather than to a live operator.[62] The petitioner had argued that while a live operator could remember or record numbers, the switching equipment through which his calls had been conveyed could not do so unless so programmed. Therefore, since switching equipment does not normally record local calls such as the ones the petitioner made, his expectation of privacy was legitimate. The Court stated that such analysis would make a "crazy quilt" out of the fourth amendment; constitutional protection would depend on whether a telephone company has decided to automate or not.[63] The Court concluded that the petitioner had not demonstrated a subjective expectation of privacy that society was prepared to recognize as reasonable. Consequently, there was no search within the meaning of the fourth amendment.[64]

In a footnote[65] the Court addressed Justice Marshall's criticism in dissent that the majority's decision would allow the government to define the

57. United States v. Miller, 425 U.S. 435, 442-44 (1976); Couch v. United States, 409 U.S. 322, 335-36 (1973); United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lopez v. United States, 373 U.S. 427, 438 (1963).

58. United States v. Miller, 425 U.S. 435, 443 (1976).

59. 425 U.S. 435 (1976); *see* Note, *No Expectation of Privacy in Bank Records—United States v. Miller*, 26 DE PAUL L. REV. 146 (1976).

60. 99 S. Ct. at 2582, 61 L. Ed. 2d at 229. In *Miller*, however, the Court emphasized that the bank was a party to the information because the information was conveyed in the form of negotiable instruments. United States v. Miller, 425 U.S. 435, 441-43 (1976); *see* Smith v. State, 283 Md. 156, 389 A.2d 858, 872 (1978) (Cole, J., dissenting) (although a bank may be a party to a negotiable instrument, the telephone company is not a party to a telephone call; since the bank is a party to the negotiable instrument the bank depositor never operates on the assumption that the information will remain private; the telephone caller, however, operates upon a different assumption).

61. *But see* Stoner v. California, 376 U.S. 483 (1964) (a hotel room is protected against unauthorized police intrusions even though the occupant of the room has surrendered some of his privacy by expressly or impliedly giving janitors, maids, and repairmen permission to enter); Chapman v. United States, 365 U.S. 610 (1961) (even though a landlord may enter his tenant's house for certain purposes, the fourth amendment still protects the house from police intrusion with the landlord's permission); 1 W. LAFAVE, *supra* note 5, § 2.7(b).

62. 99 S. Ct. at 2582-83, 61 L. Ed. 2d at 229-30.

63. *Id.*

64. *Id.* at 2583, 61 L. Ed. 2d at 230.

65. *Id.* at 2580 n.5, 61 L. Ed. 2d at 227 n.5.

scope of the fourth amendment.[66] The Court stated that in certain instances a court might need to shift its focus from a subjective inquiry to a "normative inquiry."[67] If, for example, the government publicly announced that all homes would be subject to warrantless governmental intrusion, or if an alien refugee expected his telephone conversations to be monitored as they had been in the country that he had fled, any actual subjective expectation of privacy would be minimal at best. In such instances, "influences alien to well-recognized Fourth Amendment freedoms"[68] would be operating, and consequently, subjective expectations would not be determinative. Rather, a normative inquiry to determine whether a legitimate expectation of privacy existed would be proper.[69] Nevertheless, Justice Marshall found this concession unsatisfactory. The Court, he said, did not explain what circumstances would give rise to such an inquiry or why Smith's case was not among them.[70]

Justice Stewart's dissent insisted that the passing of information through the facilities of a telephone company is not dispositive.[71] All telephone conversations have to be transmitted through the telephone company, and yet *Katz* holds that a caller has a reasonable expectation of privacy in his conversations.[72] The dispositive fact, therefore, is that the numbers one dials can reveal the intimate details of one's life.[73] Moreover, the numbers are an integral part of the conversation itself,[74] and are dialed from a home or office, locations that without question are protected by the fourth amendment.[75] Accordingly, Justice Stewart concluded that the telephone subscriber has a legitimate expectation of privacy with numbers he dials.[76]

Justice Marshall also dissented from the Court's conclusion, stating that he lacked the Court's "apparently exhaustive knowledge"[77] of telephone books and of the public's reading habits. He therefore would not assume that the public is aware of the mechanisms for tracing an obscene call. Moreover, even if the public knows that the telephone company can record the numbers dialed for internal reasons within the company, the public does not expect this information to be released to anyone outside the telephone company.[78] The public, therefore, has a partial expectation of privacy that may be protectible since privacy need not be "possessed

66. *See* notes 83-84 *infra* and accompanying text.
67. 99 S. Ct. at 2580 n.5, 61 L. Ed. 2d at 227 n.5.
68. *Id.*
69. *Id. But cf.* People v. Canard, 257 Cal. App. 2d 444, 65 Cal. Rptr. 15, 29-30 (1967), *cert. denied*, 393 U.S. 912 (1968) (police chief authorization to monitor department telephone lines did not violate fourth amendment because offenders using phones could reasonably expect their calls to be monitored).
70. 99 S. Ct. at 2585, 61 L. Ed. 2d at 233.
71. *Id.* at 2583, 61 L. Ed. 2d at 230-31 (Stewart, J., dissenting).
72. Katz v. United States, 389 U.S. 347 (1967).
73. 99 S. Ct. at 2586, 61 L. Ed. 2d at 233-34.
74. *See* note 47 *supra* and accompanying text.
75. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (a man's home is a place where he expects privacy).
76. 99 S. Ct. at 2584, 61 L. Ed. 2d at 231 (Stewart, J., dissenting).
77. *Id.* at 2584 n.1, 61 L. Ed. 2d at 232 n.1.
78. *Id.*; *see* notes 53-55 *supra*; 1 W. LAFAVE, *supra* note 5, § 2.7(b).

absolutely or not at all."[79] This argument continued Justice Marshall's disagreement with the majority of the Court over whether a person loses his fourth amendment protection whenever he conveys information to another person.[80]

Justice Marshall further attacked the majority's analysis, arguing that to speak of assuming a risk is implicitly to speak of choice and of realistic alternatives.[81] The choice of either foregoing use of the telephone completely or of subjecting oneself to the possibility of pen register surveillance is not a choice between realistic alternatives. Thus, according to Justice Marshall, to speak of assumption of risk is idle.[82]

Justice Marshall's more fundamental concern was that risk analysis would allow the government to define the scope of the fourth amendment.[83] The government could, for example, notify the public that first-class mail would henceforth be read. Anyone who thereafter chose to mail a first-class letter would accordingly assume the risk of disclosure. Justice Marshall would reject the principle that one who imparts information to another assumes the risk of disclosure, replacing it with the principle that one assumes only those risks that should be assumed by a free society.[84] Extensive intrusions that significantly jeopardize people's sense of security should be proscribed.[85] To Justice Marshall, the installation and use of a pen register without a warrant would be such an intrusion.[86] The vital role played by telephones in everyday life,[87] the potential for uncontrolled surveillance by government authorities, and the value of telephone privacy to such groups as unpopular political organizations or journalists with confidential sources demand such a conclusion.[88]

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79. 99 S. Ct. at 2584, 61 L. Ed. 2d at 232 (Marshall, J., dissenting); *see* 1 W. LAFAVE, *supra* note 5, § 2.1, at 234-40.

80. United States v. Miller, 425 U.S. 435, 455-56 (1976) (Marshall, J., dissenting); California Bankers Ass'n v. Schultz, 416 U.S. 21, 95-96 (1974) (Marshall, J., dissenting); United States v. White, 401 U.S. 745, 795-96 (1971) (Marshall, J., dissenting).

81. *Id.* at 2585, 61 L. Ed. 2d at 232-33 (Marshall, J., dissenting).

82. *Id.*

83. *Id.*; *see* Amsterdam, note 26 *supra*. Justice Harlan, who propounded the subjective expectation inquiry in *Katz*, eventually modified his position and in United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting), stated that analysis under *Katz* "must . . . transcend the search for subjective expectations." Professor Amsterdam, also noting that a subjective expectation inquiry would allow the government to define the scope of the fourth amendment, stated that "[a]n actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects." Amsterdam, *supra* note 26, at 384 (1974). *See* 1 W. LAFAVE, *supra* note 5, § 2.1, at 229-30.

84. 99 S. Ct. at 2585, 61 L. Ed. 2d at 233; *see* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting) (the Court should not "recite [any risks] . . . without examining the desirability of saddling them upon society").

85. *See* United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

86. 99 S. Ct. at 2586, 61 L. Ed. 2d at 233.

87. *See* Katz v. United States, 389 U.S. 347, 352 (1967).

88. Commentators have claimed that electronic eavesdropping has a chilling effect on first amendment rights of free speech; persons will speak more cautiously fearing they are being overheard. King, *Wiretapping and Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17, 30 (1961); *see* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 2.05(3)(a) (1970); Comment, *Do We Have to Live With Eavesdropping: A*