

ment.³⁹¹ In so holding, the Court, without alluding to the matter, overruled in effect the second rationale of *Olmstead*, the premise that conversations could not be seized.

The Berger and Katz Cases.—In *Berger v. New York*,³⁹² the Court confirmed the obsolescence of the alternative holding in *Olmstead* that conversations could not be seized in the Fourth Amendment sense.³⁹³ *Berger* held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of “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.” For the five-Justice majority, Justice Clark discerned several constitutional defects in the law. “First, . . . eavesdropping is authorized without requiring belief that any particular offense has been or is being committed; nor that the ‘property’ sought, the conversations, be particularly described.”

“The purpose of the probable-cause requirement of the Fourth Amendment to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed is thereby wholly aborted. Likewise the statute’s failure to describe with particularity the conversations sought gives the officer a roving commission to ‘seize’ any and all conversations. It is true that the statute requires the naming of ‘the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . .’ But this does no more than identify the person whose constitutionally protected area is to be invaded rather than ‘particularly describing’ the communications, conversations, or discussions to be seized. . . . Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits . . . extensions of the original two-month period—presumably for two months each—on a mere showing that such extension is ‘in the

³⁹¹ *Silverman v. United States*, 365 U.S. 505 (1961). See also *Clinton v. Virginia*, 377 U.S. 158 (1964) (physical trespass found with regard to amplifying device stuck in a partition wall with a thumb tack).

³⁹² 388 U.S. 41 (1967).

³⁹³ 388 U.S. at 50–53.