SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 35

CHARLES KATZ, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

4 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Criminal Docket 34715
See Misc. 1209

THE UNITED STATES
vs.
CHARLES KATZ

18 USC 1084: Interstate Transmission of bets and wagers and information assisting in the placing of bets and wagers.

Date	Name or Receipt No.	Rec.	8 cts. Disb.
6-22-65	C. K. (Fine)	300.00	6-25-65
6-28-65	BH (C. K.) (Appl.)	5.00	7- 2-65

Docket Entries

Date	
3/17/65	Ent ord for flg Indict & fxg bail at $1,000. Fld Indict. Md. JS-2. (CC). Fld $1,000. NACIC Bond posted 2/25/65 bef Commr. Hermann at L.A., Calif. Fld Not of Flg Bond.
3/29/65	Fld Pltf's oppos to deft's Mot for suppression of evidence and for return of evidence; and Memo of pts & auths in suppt.
4/ 5/65	Hrg deft's mot to suppress evid, sw witns mkd exbts, both sides rest & Court takes under submn & ord cont to 4/13/65, 1:30 PM for ruling. (JWC). Atty Burton Marks retnd. Deft arraigned.
4/ 5/65	Ord all documents filed in Case Misc. 1209 be incorporated herein. Fld Defts Not of Mot & Mot for return of evidence and to suppress Evidence with pts & auths in suppt. (JWC).
4/13/65	Court makes ruling on deft's mot to suppress. Ct grants in part & denies in part. Deft pleads N/G all 8 cts. Ord set for ext 2 day jury trial on 5/17/65 9:30 am (JWC)
5/ 7/65	Fld deft Charles Katz' Mot to dismiss Indict (Rule 12), FRCP, with pts & auths in suppt. Fld Not of Mot retnble 5/17/65 bef (CC) to dism Indict.

Date	
5/11/65	Fld Ord (JWC) permitting withdrawal of certain exbts.
5 5/13/65	Fld govts trial memo.
5/13/65	Fld Pltf's oppos to deft's Mot to dismiss Indict with Memo of pts & auths in suppt.
5/17/65	Deft & Govt waive Jury & Waiver approved by Court & ent ord cont to 5/18/65 for hrg Mot to dismiss & for trial (CC). Fld Jury Waiver & Ord thereon approving. (CC).
5/18/65	Ent ord assigning case to Judge Curtis for all fur procs. (CC).
	Ent. ord Court trial cont to 5/19/65, 11 AM. (JWC).
5/19/65	Court trial, 1st day. sw wits adm exhbs ord cont to 5/20/65 1:30 am fur court trial (JWC)
5/20/65	Fur Court Trial, 2nd day, both sides rest & mk arguments. Court finds deft Guilty as chgd in all 8 counts. Ord refd to P/O for I&R & cont to 6/21/65, 2 PM for sent. Issd abstr to P/O. (JWC).
5/24/65	Fld deft Katz' Mot for a New Trial and for a Judgment of Acquittal with pts & auths in suppt.
6/ 3/65	Fld Govt's oppos to defts mot for Judgmt of Acquittal, and in the alt for New Trial.
6/21/65	Mot deft for New Trial ordered denied. Sent deft pay fine to U.S.A. in the amt of $300.00 on ea cts 1 thru 8, concurr. (Total Fine $300.00). Deft ord stand committed until fine paid. Ord deft granted 24 hrs stay on payment of fine. Bond exon. Fld Judgmt & issd cys. Ent. 6/22/65. Md. JS-3 (JWC).
6/28/65	Fld deft's NOTICE OF APPEAL with proof of service to U. S. Atty. Issd abstr re Not of Appeal to U. S. Mars. Md stmt of docket entries. Pd. $5.00.
6/30/65	Fld appellant's desig of record on appeal.
7/ 6/65	Fld Appellee's counterdesignation of Record on Appeal.
7/16/65	Fld Commit retnd exec.
9/29/65	Fld Applic for extnsion of time to file reporter's transc on Record on Appeal & Ord (PH for CC) thereon extendg time to & incldg 10/25/65.

(File endorsement omitted)

6 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

February, 1965 Grand Jury

No. 34715 CD

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES KATZ, *Defendant*

Indictment—Filed March 17, 1965

[18 U.S.C. § 1084: Interstate Transmission of bets and wagers and information assisting in the placing of bets and wagers]

The Grand Jury charges:

COUNT ONE

[18 U.S.C. §1084]

On or about February 19, 1965, at approximately 8:43 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of information assisting in the placing of bets and wagers.

7 COUNT TWO

[18 U.S.C. §1084]

On or about February 19, 1965, at approximately 8:54 p.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

8 COUNT THREE

[18 U.S.C. §1084]

On or about February 20, 1965, at approximately 8:31 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

9 COUNT FOUR

[18 U.S.C. §1084]

On or about February 21, 1965, at approximately 9:31 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

10 COUNT FIVE

[18 U.S.C. §1084]

On or about February 23, 1965, at approximately 8:44 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is, a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Miami, Florida, of information assisting in the placing of bets and wagers.

11 COUNT SIX

[18 U.S.C. §1084]

On or about February 24, 1965, at approximately 8:56 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering, did knowingly use a wire communication facility, that is, a telephone facility, for the

transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California, to Miami, Florida, of bets and wagers and information assisting in the placing of bets and wagers.

12 COUNT SEVEN

[18 U.S.C. §1084]

On or about February 25, 1965, at approximately 8:46 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering, did knowingly use a wire communication facility, that is, a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

13 COUNT EIGHT

[18 U.S.C. §1084]

On or about February 25, 1965, at approximately 8:53 a.m., defendant CHARLES KATZ, being engaged in the business of betting and wagering did knowingly use a wire communication facility, that is, a telephone facility, for the transmission in interstate commerce, from Los Angeles County, California, within the Central Division of the Southern District of California to Boston, Massachusetts, of bets and wagers, and information assisting in the placing of bets and wagers.

A TRUE BILL

/s/ FRANCIS E. OAKS
Foreman

/s/ MANUEL L. REAL
United States Attorney

(File endorsement omitted)

14 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

Commissioner's Docket No. 42
Case No. 129

Notice of Motion to Suppress Evidence and for Return of Evidence (Exhibits and Points and Authorities in Support Thereof)—Filed April 5, 1965

To the Clerk of the Above Entitled Court and to United States of America and Its Attorneys:

Please Take Notice that on the 22 day of March, 1965, at 2:00 P.M. or as soon thereafter as counsel may be heard in the courtroom of Judge Charles H. Carr at the United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, a motion will be made, and is hereby made for the following relief:

1) That all papers, records, documents and other property seized by the Government on February 25, 1965 from the home of the defendant Charles Katz pursuant to search warrant be returned to the defendant. (A copy of said search warrant and what is presumed to be the affidavit of Special Agent for the FBI, John Robert Barron, and inventory is attached hereto as an exhibit); and

2) That any and all of the aforesaid documents, records, papers and other property so seized be suppressed
15 and that the United States District Attorney be restrained from using any documents or other papers aforesaid upon the trial or otherwise, or any information directly or indirectly attained therefrom, or by means thereof; and

3) That all of the said property so unlawfully seized be returned forthwith to the defendant; and

4) That all property taken from the person of the defendant on the date of his arrest, to wit, February 25, 1965, be similarly suppressed and returned forthwith to the defendant; and

PLEASE TAKE FURTHER NOTICE that at the aforesaid date and time, further motions will be made with respect to the suppression of evidence obtained pursuant to invalid searches and seizures on February 19, 20, 21, 23 and 24 of conversations had by the defendant within public phone booths located at 8210 Sunset Boulevard, Hollywood, California, which have phone numbers OL 4-9275 and OL 4-9276, which said conversations were tape recorded by having microphones taped to the outside of said phone booths.

AND FURTHER motion will be made to suppress evidence of any conversations heard by Special Agent Allen F. Frei of the Federal Bureau of Investigation overheard on February 23, 1965 or any other date while said special agent occupied Room 123 of the Sunset Towers West, which is adjacent to defendant's room 122, all of which aforesaid evidence and conversations were seized and obtained from the defendant in violation of Amendment Four to the United States Constitution.

This motion will be based upon all the files, records, affidavits and inventory contained in the 1965 Commissioner's Docket No. 42 (Case No. 129); upon such evidence which shall be produced at the time of the hearing of said motion and upon the points and authorities submitted herewith and said motions will be based generally upon the following grounds:

16 1) That any conversations of the defendant overheard by special agents of the FBI were obtained by a direct violation of the defendant's right to privacy and without warrant, and were therefore unlawful "searches and seizures" in violation of the defendant's rights under the Fourth Amendment to the United States.

2) That any arrest or search warrant issued upon the information obtained through the use of illegally obtained evidence is illegal and void.

3) That the search warrant obtained was not obtained upon any probable cause and was void.

4) That the search warrant was a general search warrant and void.

5) That the search warrant was intended and used for the purpose of obtaining evidence and being an "evidentiary search warrant" is void.

DATED: March 8, 1965.

Respectfully submitted,

/s/ BURTON MARKS

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17 POINTS AND AUTHORITIES

1) THE UNLAWFUL OBTAINING OF EVIDENCE THROUGH THE AID OF LISTENING DEVICES (THE UNLAWFUL INVASION).

It is submitted that whatever vitality *Olmstead vs. U. S.*, 277 U.S. 438, 72 Law Ed. 944, had in prior years, it is now a "dead letter" case in that electronic eavesdropping will not be countenanced by the United States Supreme Court as a violation of the Fourth Amendment. See *Silverman vs. U. S.*, 365 U.S. 505, 5 Law Ed. 2d 734 and dissenting opinion.

> *Lopez vs. U. S.*, 373 U.S. 427, 10 Law Ed. 2d 462 (with special reference to the dissents of Justices Brennan, Douglas and Goldberg).

In 1963, the Ninth Circuit in *People of the State of California vs. Hurst*, 325 Fed. 2d 891, cited with approval Brock vs. U. S., 223 Fed. 2d 681 as follows:

> "Whatever quibbles there may be as to where the curtilage begins and ends, clear it is that standing on a man's premises and looking in his bedroom window is a violation of his 'right to be let alone' as guaranteed by the Fourth Amendment." (325 Fed. 2d 898).

Surely a man has as much right to be let alone in a private telephone booth as in his own home. Although the affidavit of agent Barron does not indicate how the conversations were overheard from the adjoining room to the defendant's apartment, it is submitted that evidence at the time of the motion will show that these conversations were also overheard through electronic eavesdropping.

It is quite obvious that if the conversations overheard and electronically recorded by special agents of the FBI were obtained in violation of the Fourth Amendment, that that evidence could not be used to establish "probable cause" for an arrest or a search warrant, since such
18 warrants would be the "fruit of the poisonous tree."

Obviously, when an illegal search and seizure has been made and conducted and the same is shown by evidence, the burden of proof shifts to the Government to show probable cause for such search and seizure sufficient to justify the same. (*U. S. vs. Paroutian,* 299 Fed. 2d 486).

2) THE SEARCH WARRANT WAS VOID FOR TWO REASONS: (A) IT WAS AN EVIDENTIARY SEARCH WARRANT, AND (B) IT WAS A GENERAL SEARCH WARRANT, BOTH OF WHICH ARE PROHIBITED BY THE FOURTH AMENDMENT.

A) A search warrant which authorizes a search for evidence is illegal; it violates both the Fourth and Fifth Amendments to the United States Constitution.

The constitutional law is unerringly to the effect that a search for evidence violates these constitutional rights. (See Harris vs. U. S., 331 U.S. 145, 154, especially where as here the items specified in the search warrant are not the "fruits or instrumentalities" of the crimes of using the wires or violation of the Internal Revenue Code.

Recently the Court of Appeals for the Ninth Circuit in *Gilbert vs. U. S.,* 291 Fed. 2d 586, 596 (1961), ruled:

> "We think we must recognize and respect '. . . the distinction between merely evidentiary materials, on the one hand which may not be seized . . .' "

And searches for instrumentalities, contraband, etc., citing Harris vs. U. S., and the court held illegally seized material obtained during a lawful search, because conducted as incident to a lawful arrest, but which were evidentiary in character.

In *Boyd vs. U. S.,* 116 U.S. 16, 29 Law Ed. 746,
19 the court pointed out the distinction between judicial process to seize property such as stolen goods, articles upon which duty is owed to the Government,

articles seized on attachment to satisfy a debt, and the case there at bar, namely, to produce "the invoice of the 29 cases" as to which the Government claimed duty was owed and which it wanted forfeited, held:

> "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of person security, personal liberty and private property, for that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Cambden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forceable and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of a crime or forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (See also *Gouled vs. U. S.*, 255 U.S. 298; *Carrol vs. U. S.*, 267 U.S. 132; *Lefkowitz vs. U. S.*, 285 U.S. 452; *U. S. vs. Rebinowitz,* 339 U.S. 56; *Adel vs. U. S.*, 362 U.S. 217; *Woo Lai Chun vs. U. S.*, 274 Fed. 2d 708 (Ninth Circuit, 1960).)

B) The "general search warrant."

A mere glance at the permissive scope of the search warrant and the inventory of matters and materials taken from the home of the defendant dispels any doubt that the search was not only "evidentiary" in nature, but that the warrant was a "general" search warrant and condemned. (See *Stanford vs. Texas,* 13 Law Ed. 2d 431 (January 18, 1965).)

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron vs. U. S.*, 275 U.S. 192, 196, 72 Law Ed. 2d 231, as cited in *Stanford vs. Texas, supra,* at page 437.

It is also submitted that upon seizure of items not specifically described in the warrant, assuming it were not too general, the entire search must be declared invalid since the validly seized items cannot be severed from the invalidly seized items. See *Marcus vs. Search Warrants,* 367 U.S. 717, 6 Law Ed. 2d 1127.

Respectfully submitted,

/s/ BURTON MARKS

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21 **Exhibits to Notice of Motion**

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

Commissioner's Docket No. 42

Case No. 129

UNITED STATES OF AMERICA

v.

THE PREMISES KNOWN AS ROOM 123 - 8400 SUNSET BLVD., SUNSET TOWERS WEST, LOS ANGELES, CALIFORNIA

SEARCH WARRANT

To any Deputy U. S. Marshal or any Special Agent of the Federal Bureau of Investigation.

Affidavit having been made before me by John Robert Barron that he has reason to believe that on the premises known as Room 123 - 8400 Sunset Blvd., Sunset Towers West, Los Angeles, California, in the Southern District of California there is now being concealed certain property, namely bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings, which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, and violations of 441, 4412 and

Section 7203 of the Internal Revenue Code, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant { in the daytime / at any time in the day or night[1] } and making the search and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 25th day of February, 1965.

RUSSELL R. HERMANN,
U. S. Commissioner.

JKV:mao

Certified as a True and Correct Copy of the Original Document which is now on file in this office.

RUSSELL R. HERMANN,
United States Commissioner.

22 I am John Robert Barron, Special Agent of the Federal Bureau of Investigation, assigned to the Los Angeles Office.

For the past two years I have been engaged in the investigating of bookmakers and their activities, and I have a knowledge of the methods and language of the operators.

In October 1964, I received information from confidential informants (who in the past have furnished reliable information) that a New York bookmaker was in the Los Angeles area operating a sports book.

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[1] The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

Surveillance conducted of his activities showed one of his associates to be Charles Katz, also known as Larry Day.

Subsequent investigation determined Charles Katz to be residing at the Sunset Towers West, 8400 Sunset Boulevard, Room 122, in the period February 4, 1965 to February 25, 1965, and to be in contact with gamblers.

A confidential informant who has furnished reliable information in the past, advised that Charles Katz made long distance phone calls from pay phones in the mornings and in the evening hours.

I and Special Agents of the FBI on February 10 and February 11, 1965, observed Charles Katz make phone calls which a representative of the Pacific Telephone Company, Los Angeles advised were made to Boston, Massachusetts, telephone number 254-5266.

Special Agents of the Federal Bureau of Investigation at Boston informed me that Boston telephone number 254-5266 is subscribed to by Harry Green at Apartment 4, 28 Colborne Road, Brighton, Massachusetts. Previous investigation by the FBI in Boston indicated that this apartment is used by Harry Clayton and George Lanzetta, both well known gambling figures, and associates of Elliott Paul Price, currently under federal indictment on bookmaking charges in the Southern District of New York.

On February 19, 20, 21, 23 and 24, 1965, Charles Katz was observed by me and fellow Special Agents to enter either one of two public phone booths located at 8210 Sunset Boulevard, Hollywood, California, which have phone numbers OL 4-9275 and OL 4-9276.

From these booths Charles Katz made daily station to station telephone calls to Boston, Massachusetts, telephone number 884-1733. His conversations were recorded by taping microphones on the outside of the phone booths daily. I have listened to the recordings of his conversations and in his conversations he daily received the basketball line and made wagers with the person using the telephone number he was calling.

On February 23 and 24, 1965, Charles Katz from the described booths called Miami Beach telephone number

JE. 4-0976 and on February 24, 1965, he made sports bets on the Duquesne and Temple basketball games to a party on the Miami number. He used the following language, "Give me Temple 10½ for a nickel and give me Duquesne 7½ for a nickel."

From my experience in investigating violations of the Federal Gambling Statutes I am aware that the above language construed the placing of bets.

23 On February 23, 1965, Special Agent Allen F. Frei of the Federal Bureau of Investigation, Los Angeles, occupied Room 123 of the Sunset Towers West which is adjacent to Room 122 occupied by Charles Katz. SA Frei overheard from his room Katz engage in approximately 15 telephone conversations with unknown persons, indicating he was making sports bets. Based on the information revealed in the investigation and the consistent pattern shown by the defendant in his activities, it is my opinion that defendant is engaged in the business of betting and wagering.

JOHN ROBERT BARRON,
Special Agent,
Federal Bureau of Investigation.

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24 February 25, 1965

The following items were seized by Special Agents Robert R. Rockwell and Leo V. La Rue during execution of a search warrant at Sunset Towers West, 8400 Sunset, Los Angeles, Calif. on this date:

1. One dark blue plastic brief case containing:
   1) 148 yellow, legal size sheets of lined paper. Each bears names of colleges and surnames with numbers beside them in columns.
   2) One copy 1964 Inside Football, a sport magazine. Between pages 78 and 79 is yellow legal size sheet of paper with names of colleges and various numbers.
   3) Newspaper clipping captioned "College Basketball Standings.

Brief case located in upper left hand dresser drawer.

2. Following taken from a blue National Airlines bag on floor of east closet:

25 1) Registration card issued by Las Vegas Police Department, #A-44612 to Charles (NMN) Katz.

2) Newspaper clipping starting with "The Expert: . . ." ending with "games."

3) Sheet of white, heavy paper with red handwriting. At upper left corner "Knicke" at lower right "Day."

3. Following from desk drawer:

1) Large brown envelope containing 7 copies of Sports Journal listing College and pro basketball games.

2) Two rolls of quarters—$10.00 each.

3) Copy of Basketball Yearbook 1965. Inserted between pages 26 and 27 were:

1) White sheet of paper with names of cities and numbers—Marked #1.

2) Clippings from Sports Journal dated February 23, with markings. Marked #2.

3) Six legal size yellow sheets with names of schools. Marked #3 through #8.

4) One yellow legal size sheet marked #9.

26 4. Slip of lined paper with red ink writing. Marked #10.

5. Phone slip. Marked #11. Dated 2/22/65.

6. Phone slip 1/26/65, 6:53 PM. Marked #12.

7. Lined slip with school names and markings. Marked #13.

8. Clipping from Sports Journal 2/22/ with markings. #14.

9. Clipping from Sports Journal dated 2/24 with markings and attached clipping 1/28. #15.

10. Hotel stationery with notations. #16.

11. Legal size card board with phone number. #17.

12. National Airlines Ticket, 1/22/65, serial #147560. #18.

13. Envelope with markings. #19.

LEO V. LA RUE, *Special Agent,*
FBI Los Angeles 2/25/65

ROBERT R. ROCKWELL, *Special Agent,*
FBI Los Angeles 2/25/65

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27 **Proof of Service by Mail**

(Omitted in printing)

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28 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

No. 34715 Criminal

Minutes of the Court—April 5, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge

Deputy Clerk: Leonard Brosnan Reporter: Jack Ellis

U. S. Atty, by Assistant U. S. Atty: Stephen Miller

Defendant on bond Counsel: Burton Marks

PROCEEDINGS: ARRAIGNMENT AND PLEA.

Court orders all documents filed in Miscellaneous 1209 be incorporated herein. Filed defendant's Notice of Motion and Motion to Suppress Evidence and for return of evidence with points and authorities in support.

29 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

No. 34715 Criminal

Minutes of the Court—April 5, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge

Deputy Clerk: N. E. Brockman Reporter: Jack Ellis

U. S. Atty, by Assistant U. S. Atty: Benj. S. Farber

Defendant on bond Counsel: Burton Marks

PROCEEDINGS: HEARING defendant's motion to suppress evidence:

Attorney for Government makes opening statement to the Court. Government's exhibits 1 through 20 are marked for identification. Allen Frei is called, sworn and testifies for Defendant.

Emmett Douherty is called, sworn and testifies for the Government. Leo V. LaRue is called, sworn and testifies for the Government. Government's exhibits 7 through 12, and 14 through 20 heretofore marked and admitted.

John R. Barron is called, sworn and testifies for the Government. Government's exhibits 1 through 6 theretofore marked are admitted.

Counsel for both sides make arguments to the Court.

Court takes under submission and orders case continued to April 13, 1965, 1:30 P.M. for rendering ruling.

(File endorsement omitted)

30 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

Commissioner's Docket No. 42

Case No. 129

No. 34715-CD

Opposition to Defendant's Motion for Suppression of Evidence and for Return of Evidence; and Memorandum of Points and Authorities—Filed March 29, 1965

The United States of America opposes defendant CHARLES KATZ's Motion for Suppression of Evidence and for Return of Evidence on the ground that he is not legally entitled to such relief. This Opposition is based on all of the records pertaining to the above entitled case which have been filed with the Court and on the attached Memorandum of Points and Authorities.

Respectfully submitted,

MANUEL L. REAL
United States Attorney

JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division

BENJAMIN S. FARBER
Assistant United States Attorney

/s/ BENJAMIN S. FARBER
Attorneys for
United States of America

31 **Memorandum of Points and Authorities**

I. FACTS

For the purposes of this memorandum, and to assist the Court in its determination of the legal questions presented, we will set out the facts which we anticipate will be proven during the hearing on this motion.

It will be demonstrated that as the result of confidential information, the Federal Bureau of Investigation commenced visual surveillance of defendant CHARLES KATZ's activities. Through surveillance and confidential information, it was determined that KATZ placed telephone calls from certain public telephone booths during set hours on an almost daily basis. From a check of the telephone company records, it was determined that some of these telephone calls were being placed to a telephone number in Massachusetts which was listed to an individual who was well known as a gambler to the Federal Bureau of Investigation.

On February 19, 1965, Special Agents of the Federal Bureau of Investigation observed KATZ as he left his residence. The agents who were in visual contact with KATZ signaled other agents who were waiting at the twin telephone booths normally used by KATZ. The Special Agents who were at the telephone booths attached to the outside of the telephone booths a microphone which lead to a tape recorder. At no time was there any penetration into the interior of the booth or indeed into the wall at all. Permission had previously been obtained from the telephone company to make such an attachment. As soon as KATZ left the vicinity of the telephone booth, Special Agents of the Federal Bureau of Investigation detached the microphone and wire recorder. This procedure was followed every day from February 19th to February 25th, 1965. A study of the tapes which were obtained revealed conversations having to do with the placing of bets and obtaining gambling information on the part of defendant KATZ.

32 Special Agent Allan Frei rented a room adjacent to the residence of CHARLES KATZ on February 23, 1965. That day he listened without the assistance of

electronic equipment to conversations emanating from KATZ's room which he could hear through their common wall. Some of those conversations pertained to gambling and betting.

As a result of listening to the tapes and the conversations overheard by Special Agent Frei, the agents sought and obtained a search warrant to authorize a search of defendant KATZ's residence for "bookmaking records, wagering paraphernalia, including but not limited to bet slips, betting markers, run down sheets, schedule sheets indicating the line, adding machines, money, telephones, telephone address listings". As a result of the search, certain items were taken from defendant KATZ's room. They are set out in full in the Appendix to defendant KATZ's Points and Authorities, and we will not repeat them here.

Defendant KATZ seeks the return of those items which were seized and for suppression of all conversations overheard by the Special Agents. We do not think he is entitled to that relief for the following reasons:

II. ELECTRONIC SURVEILLANCE OF THE TELEPHONE BOOTH USED BY DEFENDANT KATZ DID NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. *There was no trespass or physical intrusion into a Constitutionally protected area.*

Under the facts of this case, since there was no physical intrusion or trespass on property belonging to the defendant, it is respectfully submitted that the rationale of *Goldman* v. *United States,* 316 U.S. 129 (1942), should preclude suppression of the statements overheard in the telephone booth.

In that case, Federal agents placed a detectaphone against the outside wall of the defendant's office
33 and overheard the conversations taking place within.

The United States Supreme Court upheld the conviction and pointed out that there was no trespass or illegal intrusion into the defendant's office and therefore no illegal search and seizure. At page 135, the court said:

> "We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.

"In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by the Amendment, the petitioners recognize that they must reckon with our decision in *Olmstead* v. *United States,* 277 U.S. 438. They argue that the case may be distinguished. The suggested ground of distinction is that the *Olmstead* case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the Constitutional guarantee, and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the *Olmstead* case."

Olmstead v. *United States,* 277 U.S. 438 (1928), cited as the basis for the decision in *Goldman, supra,* was
33a decided on the ground that no trespass took place within the property belonging to the defendant. On the other hand, in *Silverman* v. *United States,* 365 U.S. 505 (1961), the United States Supreme Court held that police officers did indeed violate the Fourth Amendment to the United States Constitution when they drove a spike mike into a party wall of defendant's house, coming in contact with a heating duct which turned the entire house into one large electronic receiver. At page 511 of its Opinion, the court distinguished the facts in *Silverman, supra,* from those in *Olmstead, supra,* using these words:

"Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without

> their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."

Contrary to defendant's assertion, both *Olmstead, supra,* and *Goldman, supra,* do have vitality today. See *Silverman* v. *United States, supra,* at page 512, in which it was said: "We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch."

See also: *Lopez* v. *United States,* 373 U.S. 427 (1963), at pages 438-439:

> "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable
> 34 government agents to overhear conversations which would have been beyond the reach of the human ear. See, *e.g., Olmstead* v. *United States,* 277 U.S. 438; *Goldman* v. *United States,* 316 U.S. 129. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman* v. *United States, supra.*"

People v. *Benson,* 336 F.2d 791 (9th Cir. 1964), pages 795-796;

Cullins v. *Wainwright,* 328 F.2d 481, 482 (5th Cir. 1964).

B. *In any event, a public telephone booth is not a constitutionally protected area.*

It should be noted that in all of the cases cited above, the question presented pertained to either the defendant's home or office and this appears to be the focal point of the Court. Basically, the Court is concerned with invasion of privacy that may reveal the secrets of the home or office. See the concurring Opinion of Justice Douglas in *Silverman* v. *United States,* 365 U.S. 505 (1961), at page

513, where he discusses the problem in terms of the "intimacies of the home". But in the case at bar, the microphones were attached to a public telephone booth. It would seem that a person who uses a public telephone booth knowingly runs a considerable risk that his conversation will be overheard by the public at large through the thin walls and door of the booth. The Southern District of New York had an opportunity to decide a case which was strikingly similar in its facts. See *United States* v. *Borgese,* 235 F. Supp. 286 (S.D. N.Y. 1964). In that case Federal agents placed a microphone inside a telephone booth and overheard conversations pertaining to gambling. In upholding the action of the agents against attack on Constitutional grounds, the Court said at page 294:

35 "Nor does a public telephone booth seem to be a 'constitutionally protected area', the expression used in Lopez v. United States, above."

"The area in which privacy is guaranteed by the Fourth Amendment is essentially the 'houses of people, extended to include their offices' . . . ."

The rationale of *Borgese, supra,* may well be of assistance to this Court.

III. THE CONVERSATIONS EMANATING FROM DEFENDANT KATZ'S ROOM, WHICH WERE OVERHEARD BY A FEDERAL AGENT IN AN ADJOINING ROOM, WERE NOT CONSTITUTIONALLY PROTECTED.

As pointed out above, it is anticipated that evidence will demonstrate that Special Agent Frei took a room adjoining that of defendant KATZ and on February 23, 1965 overheard certain conversations without the use of electronic equipment. For the reasons stated above, we believe that *Goldman* v. *United States,* 316 U.S. 129 (1942), controls the instant situations. In addition, since no electronic equipment was used at all, it is doubtful that under any rational could it be considered that there was an illegal search and seizure. See *United States* v. *Hester,* 265 U.S. 57 (1924); Justice Burton's dissent: *On Lee* v. *United States,* 343 U.S. 747, 766-767 (1951).

36 IV. THE SEARCH WARRANT UTILIZED IN THIS CASE WAS A VALID SEARCH WARRANT.

The search warrant stated with particularity the items to be seized: "bookmaking records, wagering paraphernalia, including but not limited to bet slips, betting markers, run down sheets, schedule sheets indicating the line, adding machines, money, telephones, telephone address listings."

In *United States* v. *Clancy,* 276 F.2d 617, 624 (7th Circuit 1960), reversed and remanded on other grounds, 365 U.S. 312 (1961), the Court upheld a search warrant containing similar language:

> "'* * * divers records, to wit books, memorandum, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons * * * and divers other tools, instruments, apparatus, United States currency and records * * *.'"

In considering the above language that Court said at page 629:

> "That the articles to be seized by virtue of the search warrant were described with sufficient particularity, can hardly be questioned in view of the authorities. Nuckols v. United States, 1938, 69 App. D.C. 120, 99 F.2d 353, 355, certiorari denied, Floratos v. United States, 305 U.S. 626, 59 S.Ct. 89, 83 L.Ed. 401; Merritt v. United States, 6 Cir., 1957, 249 F.2d 19; see also, Clay v. United States, 5 Cir., 1957, 246 F.2d 298, certiorari denied, 355 U.S. 863, 78 S.Ct. 96, 2 L.Ed. 2d 69.

37 "In the Nuckols case, supra, a search warrant was held sufficient which commanded the seizure of '* * * gaming tables, gambling devices, race horse slips, and gambling paraphernalia * * *.' The court said, 99 F.2d at page 355:

> 'In the search of a gambling establishment the same descriptive particularity is not necessary as in the case of stolen goods.'
>
> And in Merritt v. United States, supra, 249 F.2d at page 20, the court approved affidavits for a search warrant, and the search warrant, where the affidavits described only '* * * lottery tickets and other paraphernalia "which will indicate a numbers operation is being conducted on the premises."' "

The next problem with respect to the search is raised by the defendant's assertion that the items taken from him were mere evidence and thus suppressible. It is the Government's contention that while the items taken were evidence, they also were instrumentalities of a crime and thus could be properly seized and used against the defendant. In *Marron* v. *United States,* 275 U.S. 192 (1927), the Court held that certain books and records pertinent to a bootlegging business were rightfully seized. At page 199 the Court said:

> "And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was none the less a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained, extended
> 38 to all parts of the premises used for the unlawful purpose. Cf. Sayers v. United States, 2 F. (2d) 146; Kirvin v. United States, supra; United States v. Kirschenblatt, supra. The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

Likewise, in *Clancy* v. *United States,* 276 F.2d 617 (7th Cir. 1960), books, records and papers pertaining to a book-

making operation were held to be instrumentalities of the crime.

> See also: *United States* v. *$1,058.00 in United States Currency,* 210 F. Supp. 45, 51 (W.D. Pa. 1962), affirmed without discussion of the points pertinent to this case, 323 F.2d 211 (3rd Cir. 1963).

For the reasons mentioned in *Clancy* v. *United States, supra,* at page 630, we believe that *Takahashi* v. *United States,* 143 F.2d 118 (9th Cir. 1944) is inapposite. In that case the Court found that certain books which had been seized were merely evidence of an intent to export certain items subsequent to the making of fraudulent statements to the Department of State. Thus the Court found that the books and records themselves were not instrumentalities of the crime.

Likewise, *Gilbert* v. *United States,* 291 F.2d 586 (9th Circuit 1961), has no application to this case, since the items seized in that case were merely checks and income tax returns—not being instrumentalities of the crime charged, which was forgery. The Court pointed out at page 597 that if a conspiracy had been charged, then
39 the items might well have been seized as instrumentalities of a crime.

In the case at bar, records seized were necessary to the defendant for him to carry on his business of betting. He has made such an admission to the Special Agents—as will be demonstrated by testimony. Rather, this case appears to fall within the rule of *Leahy* v. *United States,* 272 F.2d 487 (9th Cir. 1959), where the Court said at page 491:

> ". . . The revenue agents in the instant case seized an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safety deposit boxes, as well as a number of rifles, shotguns and pistols. It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime. Marron v. United States, 1927, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed 231 (officers incident to arrest may law-

fully seize account books and papers used in carrying on the criminal enterprise). Such were the records obtained in this case. The search was, therefore, a reasonable one. Harris v. United States, supra. . . .

For all of the above reasons, the Government respectfully submits that defendant KATZ's motion should be denied.

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40 **Certificate of Service by Mail**

(Omitted in printing)

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41 **Transcript of Record**

42-43 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

HONORABLE JESSE W. CURTIS, JUDGE PRESIDING

No. 34715-CD

UNITED STATES OF AMERICA, *Plaintiff*,

v.

CHARLES KATZ, *Defendant*.

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44 **Transcript of Hearing on Motion to Suppress Evidence**

LOS ANGELES, CALIFORNIA, MONDAY, APRIL 5, 1965, 10:00 A.M.

Appearances:

For the Plaintiff: MANUEL L. REAL
United States Attorney

BENJAMIN S. FARBER
Assistant United States Attorney
762 Federal Building
Los Angeles, California 90012

For the Defendant: BURTON MARKS, Esq.
8447 Wilshire Boulevard
Beverly Hills, California

(Other matters heard.)

The Clerk: U.S.A. v. Katz, 34715.

Mr. Farber: Benjamin S. Farber for the Government, your Honor. The Government is ready to proceed.

Mr. Marks: Ready for the moving party, ready to proceed.

I believe the Government is going to offer a stipulation of facts, your Honor, as to most of the facts.

I would like to note a slight change in my points and authorities; page 4, line 22, reads:

"Surely a man has as much right to bet alone . . ." The word should be ". . . be let alone . . ."

The Court: What page and line?

Mr. Marks: Page 4, line 22. It is a typographical error.

The Court: Yes.

Mr. Marks: You want to propose the stipulation?

Mr. Farber: Yes. If the court desires us to proceed, your Honor, I will.

The Court: Yes, if you will, please.

Mr. Farber: For the purposes of this motion only, your Honor, the following facts are stipulated between the defendant and the Government:

45 1. That agents of the Federal Bureau of Investigation commenced visual surveillance of the defendant Charles Katz' activities approximately ten days before February 19, 1965. Through visual surveillance and confidential information it was determined that the defendant Katz placed telephone calls from certain public telephones during set hours on an almost daily basis. From a check of telephone records it was determined that some of these telephone calls were being placed to a telephone number in Massachusetts which was listed to an individual whose reputation was well known to the Federal Bureau of Investigation as that of a gambler;

That on February 19, 1965, special agents of the Federal Bureau of Investigation observed defendant Katz as he left his residence;

That certain special agents of the Federal Bureau of Investigation who were in visual contact with defendant Katz signaled to certain other agents who were waiting at the twin telephone booths normally used by Katz that Katz was on his way.

That the special agents who were at the twin telephone booths—strike that.

That the special agents who were at the twin telephone booths attached to the outside of the telephone booths a microphone which led to a tape recorder. The
46 actual attaching was done upon receipt of a signal that defendant Katz was approximately a half a block from the booths;

That at the time that the microphones were attached to the twin telephone booths there was no penetration whatsoever inside the telephone booths, they were attached to the outside of the telephone booths by tape so that there was not even the penetration of a screw attaching the microphones to the telephone booths;

That permission had previously been obtained from the telephone company to make such attachments to the telephone company's property;

That as soon as defendant Katz left the vicinity of the twin telephone booths special agents of the Federal Bureau of Investigation detached the microphone and the wire recorder. This same procedure was followed every day from February 19th to February 25th, 1965;

That tapes of conversations were obtained on every day from February 19th to February 25th, 1965, with the exception of February 22, 1965, when through mechanical difficulty there was no recording of the conversation.

A study of the tapes which were obtained revealed conversations having to do with the placing of bets and obtaining of gambling information on the part of defendant Katz;

That Special Agent Allen Frei rented a room
47 adjacent to the residence of Charles Katz on February 23, 1965;

That on February 23, 1965, from the time that Special Agent Allen Frei entered the room adjacent to that of defendant Katz until approximately 8:00 o'clock he listened to conversations emanating from Katz' room which he could hear through a common wall, but during that whole time period he used no electronic equipment whatsoever;

That as a result of special agents reviewing the tapes obtained from the telephone booths and the conversations overheard by Special Agent Frei, the special agents of the

FBI sought and obtained a search warrant to authorize a search of defendant Katz' residence for "bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings;

That as a result of the search certain items were taken from defendant Katz' room.

Actually, your Honor, those items are set out in full in an appendix to the defendant's motion. They also will be presented to the court as exhibits.

As far as we have gone, is that stipulated?

Mr. Marks: Yes, so stipulated.

Mr. Farber: We have a further stipulation.
48 Exhibits 1 through 6, your Honor, are transcripts of the tapes which were obtained through the use of the wire recorder and the microphone. May it be stipulated that they be used for the purpose of this motion?

Mr. Marks: Yes.

The Court: Very well.

Mr. Marks: And I would like to further stipulate that the copy of the search warrant attached to my moving papers and the copy of the affidavit of John Robert Barron which is also attached to the moving papers is a true and accurate copy of the search warrant and the affidavit in support thereof.

Mr. Farber: Yes, I believe actually the search warrant is a part of the record, is it not, your Honor?

The Court: Yes.

Mr. Marks: I believe you were going to call a witness.

Mr. Farber: Your Honor, how would the court like us to proceed? Of course, the defendant is the moving party. I will be glad to put on witnesses both as to the question—

The Court: What area do you wish to explore now, counsel?

Mr. Marks: Well, I would like to explore Mr. Frei as to how he heard the conversations, even though it wasn't electronically obtained, in the next door room,
49 whether it was by mechanical amplification—

The Court: Mr. Frei will step forward and take the stand, please.

Mr. Farber: Your Honor, before Mr. Frei actually begins to testify may I lodge with the clerk Exhibits 1

through 20? They have exhibit slips on them. May they be deemed marked for identification?

The Court: They may.

(The exhibits referred to were marked Plaintiff's Exhibits 1 through 20 for identification.)

Mr. Marks: Might I reach a further point, your Honor? It's been agreed through Government counsel and myself that I requested of Government counsel on behalf of my client to be able to copy and have copies of the exhibits, of the matters seized returned. The Government has resisted this on this basis—and that will be part of our argument—that they are instrumentalities of the crime. So we have sort of generally agreed that we will present this question to the court, that if the court finds that they are instrumentalities, does that of itself prevent the defendant from obtaining copies of his own work? Or perhaps the court can give some guidance.

Mr. Farber: At some time during the proceeding, your Honor, we think that would be an appropriate question for the court to determine.

50 The Court: Very well.

ALLEN F. FREI,

called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.

The Witness: Allen F. Frei.

Direct Examination

By Mr. Marks:

Q. Mr. Frei, I believe you are a special agent with the Federal Bureau of Investigation? A. That is right, sir.

Q. And to get right to the meat of it, on or about February 23, 1965, you occupied a room adjacent to the room of Mr. Katz, I believe; is that correct? A. Correct.

Q. Was Room No. 122 the— A. I believe so, yes.

Q. And had you occupied that room before the 23rd? A. No, sir; I moved in about 11:00 o'clock in the morning of that date.

Q. Did you use any electronic equipment on any other date to overhear conversations?

Mr. Farber: I object to that question, your Honor. I would represent to the court that the only evidence that we intend to use at the time of trial or at any other
51 time with respect to this proceeding is the evidence that was obtained between the hours of 11:00 o'clock in the morning and 8:00 o'clock in the evening, February 23rd.

We believe that whether or not electronic equipment was used subsequent to that time would be irrelevant and immaterial. We would ask the court in making this order to, if it deems fit, order that any evidence obtained by Mr. Frei after February 23rd, 8:00 o'clock in the evening, not be received in evidence and that way we think that we are making it as simple as possible and not clouding the issue.

The Court: Are you agreeable to that?

Mr. Marks: In a fashion. Of course, your Honor, I can't object to them not introducing evidence that—

The Court: They don't want to introduce.

Mr. Marks: That's right.

Q. Mr. Frei, with respect to the conversations that you overheard on February 23, 1965, this was from about 11:00 in the morning until 8:00 at night; is that correct? A. Yes, sir.

Q. And you heard about fifteen conversations? A. In the course of the day I heard him make or receive approximately fifteen telephone calls of which I could hear portions of the conversation.

Q. You could not hear the entire conversations;
52 is that correct? A. Not verbatim, no, sir.

Q. So you didn't know to whom or where from these were coming? A. No, sir.

Q. Were you able to hear audibly all of the conversations? A. Parts of all the conversations.

Q. Well, did you make notes of the parts that you could hear? A. Yes, sir.

Q. And were those transcribed? A. Well, my longhand notes. They were not transcribed otherwise.

Q. Did you hear these? What, did you put your ear to the wall? A. There is a—in the mutual wall separating Mr. Katz' apartment from my room was an electrical outlet which appeared to be—electrical outlet that came out in my room also, perhaps, came out in his room, by placing

my ear exactly over the electrical outlet I could hear parts of his conversations.

Q. You didn't use any bundle of paper or anything to help amplify or select the— A. I used a drinking glass, which was in my bathroom, inverted.

53 Q. Put that over the receptacle? A. And it didn't work.

Q. Was this receptacle on the floor? A. No, sir; it was approximately waist high to a six-foot gentleman.

Q. Well, how would you be notified that it was time to put your ear to the receptacle? You certainly didn't hold it there for nine hours, did you? A. No, sir. When I moved into the room at 11:00 o'clock Mr. Katz was in the patio enjoying the sunshine, and I could then, of course, hear all conversation extremely clearly through my open window, he being approximately ten feet away from me.

Q. Was he on the phone at that time in the patio? A. During some parts of the day, yes, sir. But I could also hear that the phone rang through my open window in that manner, and then I would place my ear there.

Q. You certainly didn't hear Mr. Katz place any bets or receive any bets on that date, did you? A. I heard—to answer your question, as to making or placing bets I would not have the knowledge. What I did hear was Mr. Katz make numerous references to—or state "Philadelphia," "Northwestern" and comments to the effect that "I have Northwestern minus 7."

54 Q. In other words— A. Or "Oregon plus 4," things of that type.

Q. Is it a true statement that what he was talking about was either general talking about games that were being played and stating to the person or persons unknown that he had already bet on a certain game in a certain way? A. I would—that would call for an assumption on my part. I can testify only that I heard him say to the effect, "I have Northwestern and 8." Those are not exact quotations, but statements of that sort.

Q. Did you ever hear him say words to the effect to somebody on the phone, "Give me Northwestern and 8" which would indicate to you in your opinion that he was placing a bet? A. No, sir.

Mr. Marks: Thank you. I believe that's all of this witness, your Honor.

The Court: Do you have any examination?
Mr. Farber: Yes; just a little, your Honor.

Cross Examination

By Mr. Farber:

Q. Sir, would you tell us what was the conversation that you did overhear pertaining—or the bits that you have already mentioned, "Oregon plus 8" and any other conversations that you did hear which pertained to sporting events? A. In one of the conversations there was a discussion—

55 Q. Approximately what time was this conversation? A. To the best of my recollection, approximately 3:00 in the afternoon.

Q. All right. What was the conversation? A. A conversation to the effect that they were discussing—apparently the person he was talking to over the phone were (sic) discussing the line, and he made a statement to the effect "Don't worry about the line. I have phoned Boston three times about it today."

There was apparently a discussion or concern about some money. There Katz mentioned, "Don't worry about," I believe the name was "Sammy" or a name similar to Sammy. "He is the most honorable gentleman in the country."

Other than their discussion as to a plus or minus on certain teams that's about the extent of it.

Mr. Farber: Thank you. I have nothing further of this witness, your Honor.

Mr. Marks: Nothing further.

The Court: You may step down.

Mr. Farber: The Government calls as its next witness—excuse me, counsel. Do you have any other witnesses you want to call?

Mr. Marks: No.

Mr. Farber: The Government calls as its next witness Mr. Emmett Doherty.

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.
The Witness: Emmett Doherty.

Direct Examination

By Mr. Farber:

Q. Mr. Doherty, you are a special agent of the Federal Bureau of Investigation? A. Yes.
Q. And for how long have you been so employed? A. Seventeen years.
Q. Now, sir, have you been active in the investigation of defendant Charles Katz? A. Yes, I have.
Q. Now, were you present at the arrest of defendant Charles Katz? A. Yes, I was.
Q. And at that time, sir, was there a search made of defendant Charles Katz? A. Yes, there was.
Q. Incidentally, was that pursuant to a warrant of arrest? A. Yes, it was.

57 Q. Now, at the time of defendant Charles Katz' arrest were any items taken from his person? A. Yes.

Q. Sir, I'd like you to take a look at Government's Exhibit 13, please.
Mr. Marks: May I approach the witness and look at it with him?
The Court: Yes.

By Mr. Farber:

Q. Have you had an opportunity to take a look at Government's Exhibit 13? A. Yes, I have.
Q. And is Government's 13 an item you took off the person of defendant Charles Katz? A. Yes, it is.
Q. And that was pursuant to the arrest? A. Yes.
Mr. Farber: I move Government's Exhibit 13 be received for purposes of this hearing, your Honor.
The Court: It may be admitted.
Mr. Marks: We offer the same objection, your Honor, as to the other exhibits on the ground the arrest was unlawful; even though there was a warrant of arrest, that the search

was not incidental to the arrest and the evidence is irrelevant and immaterial.

The Court: Well, very well. It will be overruled.

58 (The exhibit marked Plaintiff's Exhibit 13 was received in evidence.)

By Mr. Farber:

Q. Now, what is Government's Exhibit 13? A. It is a section out of a sports line sheet dated Thursday, February 25th, listing two college games and then listing Southern Conference games.

Q. I am sorry, Mr. Doherty. Can you speak up a little louder? A. It's a sport line sheet dated February—Thursday, February 25th, listing a couple of college games plus the Southern Conference schedule games.

Q. And are there certain notations? A. Yes, there are.

Q. And what are those notations? Not the exact figures. A. Numerical digits listed behind the names of the schools.

Q. Are they some sort of record? A. Pardon?

Q. Are they some sort of record? A. Yes.

Q. What sort of record, if you know?

Mr. Marks: Objected to as calling for a conclusion. Is this what you want me to stipulate?

59 Mr. Farber: I think the objection is well taken.

The Witness: They are—

By Mr. Farber:

Q. Now, at the time of—

I withdraw that question, your Honor.

Now, at the time of the arrest, Dr. Doherty, did you advise defendant Katz of his rights? A. Yes.

Q. And what did you tell him? A. I told him he did not have to make any statement, that any statements that he did make could be used against him in a court of law; that he was entitled to an attorney. That's it.

Q. Did he say whether or not he understood that advice? A. He nodded that he understood.

Q. Now, sir, subsequent to the arrest of the defendant Katz did you have an occasion to see him again? A. Yes, I did.

Q. When was that? A. That was on the following day.

Q. And was anybody else present? A. Yes.

Q. Who? A. Agent Donovan.

60 Q. Where? A. At the Sunset Towers West in Los Angeles.

Q. Was that defendant Katz' residence? A. Yes.

Q. For what purpose were you there? A. We were there to return a fingernail file and some paper clips which we failed to—not paper clips but fingernail clippers which we failed to give him back the day before.

Q. At that time did you have a conversation with defendant Katz? A. Yes, we did.

Q. Who initiated the conversation, you or he? A. Well, to initiate—we called him to begin with and met him in the lobby. So in effect we had initiated it.

But while we were talking to him he asked if there would be any possibility of him getting his records back.

Q. May I show you Government's Exhibit No. 7 for identification. Government's Exhibit 7, I believe, is the folder.

Would you take a look at the contents in Government's Exhibit 7? Are those the records? A. Yes.

Mr. Marks: Just a minute. I object to that as

61 calling for a conclusion.

Mr. Farber: If you know.

Mr. Marks: I object to that as calling for a conclusion. We are now going from a conversation which I wanted to object to, your Honor, because it doesn't appear that on the date—date following the arrest the agent visited the defendant and such advice was given as to his right to remain silent.

The Court: I don't think he has to repeat it every time.

Mr. Marks: I think he might have to in this situation where he has already been placed under arrest.

The Court: The objection will be overrulel.

Mr. Farber: Let me ask this question, too, so there will be two separate points for the court's consideration.

Q. With respect to the records, who initiated the conversation pertaining to the records? A. Mr. Katz.

Q. Did you and Mr. Donovan or did Mr. Katz? A. No; Mr. Katz initiated it.

Q. All right. What did he say pertaining to the records? A. He said that these records involved a great deal of

work on his part, that he couldn't replace them,
62 that he needed the records—he needed the records,
and that if he had the records back that he would continue to bet.

Then he facetiously made some remark: "And if I continue to bet then you will be able to get the big fellows." But this "big fellows" remark wasn't a sincere type of remark.

Mr. Farber: Thank you. I have nothing further of this witness.

Cross Examination

By Mr. Marks:

Q. Did you have those records with you? A. No.

Q. Well, what did he say when he said, "May I have my records back"? A. He was—

Q. Or words to that effect? A. He was referring to the records, I believe—might have been handicap sheets mentioned. But anyhow there was a complete understanding between us as to what records he was talking about.

Mr. Marks: I move to strike that as unresponsive, your Honor.

The Court: It may go out.

By Mr. Marks:

Q. What did Mr. Katz say when he asked you for
63 the items which had been seized? A. He asked for his records.

Q. Did he use the word "records"? A. Yes.

Q. Now—I am sorry. Had you finished? A. I just can't quite recall exactly what the terminology was, but he asked for his records. And it was pertaining to the amount of work in regard to the basketball records.

Q. Basketball records? A. Yes.

Q. Let me see if I get this correct. You came to his apartment on the day after the arrest? A. We came to the apartment house, not to his—

Q. And you called up to him on the phone? A. Yes.

Q. And said, "Charlie, we took your nail clippers by mistake, we'd like to give them back to you"? A. Right. I didn't make the call, it would be—

Q. Words to that effect? A. Yes; I presume.

Q. Now, the purpose of going there was solely to return his nail clippers, not to obtain any admissions or incriminating statements; is that correct? A. That is right.

Q. And he came down to the lobby and he said, "Instead of nail clippers why don't you give me my records
64 back." Right? A. He said—yes.

Q. All right. A. "I can replace these for 35 cents but I can't replace the records."

Q. Right. He said that those—that the documents that you had taken he had spent about 30 years in preparing; isn't that correct? A. Words to that effect, yes.

Q. Those were the results of 30 years of work? A. Yes.

Mr. Marks: All right. Thank you. That's all.

Mr. Farber: Excuse me. I just want to ask one question.

Redirect Examination

By Mr. Farber:

Q. Government's Exhibit 7, are those basketball records, if you know? A. Yes. They appear to be basketball records.

Mr. Farber: Thank you. I have nothing further, your Honor, of this witness.

The Government calls as its next witness Mr. Donovan.

65 TIMOTHY L. DONOVAN,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.

The Witness: Timothy L. Donovan.

Direct Examination

By Mr. Farber:

Q. Now, Mr. Donovan, were you present with Mr. Doherty on the day that he went to the residence of Mr. Katz to return the nail clippers? A. Yes, I was.

Q. And was there a conversation with Mr. Katz pertaining to certain records? A. Yes, there was.

Q. And would you tell us what that conversation was, sir?

Mr. Marks: May I make the same objection, your Honor, as heretofore raised? No showing that the statements were volunteered or that the person who once having been ar-

rested was advised of his rights to be silent and his right to an attorney.

The Court: Overruled.

Mr. Farber: Thank you, your Honor.

The Witness: I telephonically contacted Mr. Katz advising him that I had in my possession a nail file and a
66 nail clipper which had been taken from him on the previous day and I wished to return them to him. Mr. Katz volunteered that he would come to the lobby to meet Mr. Doherty and myself, and he did so.

I personally gave Mr. Katz the two items in question. Mr. Katz commented, "These only cost 35 cents. I can replace these. Can I have my records?"

Q. Did he specify what records, do you recollect? A. No, he did not.

Q. Go ahead. A. Mr. Katz continued concerning his records that it took years and years of labor and research to compile them and without them he was out of business.

Q. Did he say what business? A. Mr. Katz indicated he had been a handicapper and bettor all his life. Mr. Katz was advised that agents of the Federal Bureau of Investigation had no authority concerning the disposition of the sheets at that time and that his attorney should contact the United States Attorney.

Q. Now, we talked about records that were seized. To your knowledge were certain records, certain items taken from Mr. Katz the day prior to your going to his residence with the nail clipper and the nail file?

Mr. Marks: Stipulated the items contained in the—

Mr. Farber: Search warrant?

67 Mr. Marks: —in the return sheet.

Mr. Farber: Fine. I will accept that stipulation and will no longer question.

Thank you. I have no further questions of Mr. Donovan, your Honor.

Cross Examination

By Mr. Marks:

Q. Mr. Donovan, you didn't help conduct the search, did you? A. I did not, sir.

Mr. Marks: Thank you.

The Court: You may step down.

Mr. Farber: The Government calls Mr. LaRue.

68 LEO V. LaRUE,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.
The Witness: Leo V. LaRue.

Direct Examination

By Mr. Farber:

Q. What is your occupation, sir? A. I am a special agent with the FBI.
Q. Now, Mr. LaRue, how long have you been so employed? A. Twelve years.
Q. Have you been engaged in the investigation of defendant Charles Katz? A. Yes, I have.
Q. Was it you who actually executed the search warrant? A. Yes.
Q. And what was the date of the execution, sir? A. On the 25th. February 25th.
Q. Did you pick up certain items— A. Yes.
Q. —from Mr. Katz? A. Yes, I did.
Mr. Farber: May it be stipulated, counsel, that the items that were picked up from Mr. Katz were Exhibits 7 through 20 with the exception of Exhibit 13?

69 Mr. Marks: Well, I will stipulate that the items picked up were the ones that are in evidence—or, to be produced as numbered were taken from Mr. Katz. However, I will not stipulate to the designation given to them on the evidence—
Mr. Farber: Well, it's just—you know, we just mark them for exhibit so we will all be talking about the same items.
Mr. Marks: As far as the numbers are concerned I will so stipulate.
Mr. Farber: Then, your Honor, is the stipulation clear for the record?
The Court: Yes.
Mr. Farber: Or shall I repeat it again?
The Court: Well, perhaps you had better.
Mr. Farber: All right. It is stipulated that Exhibits 7 through 20, with the exception of Exhibit 13, were received by Special Agent Leo LaRue on February 25th from the

premises of Charles Katz pursuant to a search warrant that he executed. Is that so stipulated?

Mr. Marks: Stipulated only that they were taken from the apartment and may or may not have been pursuant to a search warrant.

Mr. Farber: I will accept the stipulation.

Your Honor, I move that Exhibits 7 through 20 be
70 received in evidence. 13 is already in evidence. I move that Exhibits 7 through 20 be received in evidence for the purposes of this proceeding.

Mr. Marks: No objection.

The Court: They may be admitted.

(The exhibits marked Plaintiff's Exhibits 7 through 20 were received in evidence.)

By Mr. Farber:

Q. Now, Mr. LaRue, while you were actually engaged in the search of Mr. Katz' quarters did you have occasion to see Mr. Katz? A. Yes, I did. He came in while we were conducting the search.

Q. And was there any conversation with Mr. Katz? A. Yes. During the course of the search he asked me when he might obtain his records back.

Q. Did he specify what records? A. The ones that were referred to as No. 7, I believe.

Q. As Government's Exhibit 7? A. The 148 sheets legal size yellow tablet. And he asked me when he could have those back, and I told him that I did not know, that I had no authority over that. And he said that I must realize by taking his sheets, his records, I was putting him out of business.

In conversation he stated that that was the only
71 business he knew, that he couldn't make $60 a week doing anything else.

Q. What did he say he did? A. Handicapping and betting.

Mr. Marks: Well, I am sorry, your Honor, may I—I was a little bit lax. I'd like to move to strike these conversations again on the ground that there is no showing that at the time of the making of the statements the defendant was advised of his rights to remain silent and have an attorney.

Mr. Farber: He had already been previously warned. In addition I will ask Mr.—

The Court: This came at a time, I believe, subsequent to—

Mr. Farber: I had better establish that, your Honor.

Q. Was this subsequent to Mr. Katz' arrest? A. Yes, I was present at the time of the arrest. I assisted Doherty and Donovan in the arrest.

Q. Fine. Thank you. A. And present when statements were made by Special Agent Doherty.

Q. And with respect to the conversation that pertained to the records did you initiate that conversation with
72 Mr. Katz? A. No, I did not.

Q. Or did he initiate it with you? A. No. He asked me when could he get them back.

Mr. Farber: Thank you. I have no further questions of this witness.

Cross Examination

By Mr. Marks:

Q. Is that the sum and substance of the conversation had with Mr. Katz? A. No. We had other conversations.

Q. Did you make notes of that conversation? A. No, I did not.

Q. Everything you testified to now is strictly from your own memory? A. No. I recorded it that day on an interview form which we have. I recorded it.

Q. That's what I am asking you. Did you make a written notation of that conversation? A. After it was over, not—

Q. Yes. A. —during the conversation.

Q. Yes. Afterwards? A. That afternoon I did, yes.

Q. Do you have those written notations here? A. I don't have them with me. I think we have a copy some-
73 where.

Q. On those written notations are the conversations that you have stated here of Mr. Katz? A. In substance exactly what I said, yes.

Q. That he said, "This is my only business"? A. "You put me out of business. I have done this for 30 years." And I am not sure if he—if the comment about the sixty—making the $60 a week is in error. I wouldn't swear to it without looking at the notes.

Q. In other words, what he in essence stated was that he was a bettor? A. And a handicapper, yes.

Q. And a handicapper? A. Yes.

Q. Well, a handicapper means what? Someone who— A. One who selects the winner or selects a—places the odds and selected—

Q. That can be on horses or anything else? He didn't say he was a bookmaker? A. No.

Q. And you didn't believe he was a bookmaker? A. No. Now, what was that?

Q. You didn't believe he was a bookmaker? A. I made no conclusion on that, no. I didn't make any conclusion as to whether he was or was not.

74 Q. Well, prior to that you had executed the search warrant, you were aware of the investigation that was going on, weren't you? A. Yes.

Q. And hadn't you arrived at some conclusion as to whether or not Mr. Katz was a bettor or a bookmaker?

Mr. Farber: I will object. Mr. LaRue is not an expert and has not been qualified as such, your Honor.

The Court: Overruled.

Mr. Farber: Thank you, your Honor.

The Witness: To be honest with you, I hadn't concluded as to whether he was or was not a bookmaker. In my opinion I felt that he was either bookmaking or betting for someone else because I didn't think that he would bet to the extent that he was on his own.

Mr. Marks: All right.

Q. What other conversations happened in that apartment or occurred?

Mr. Farber: Objection, your Honor; beyond the scope of the direct examination and also—

Mr. Marks: Testing his recollection, your Honor.

Mr. Farber: —also irrelevant and immaterial.

The Court: The objection will be sustained unless you limit it to time. I think other conversations—

Mr. Marks: I am talking—

75 Q. How long was Mr. Katz in your presence while you were searching his apartment? A. About 30 minutes.

Q. And you were looking for the items specified on the search warrant; is that right? A. I was primarily making

out the list at this time. We had looked at everything and we were writing out the inventory at the time.

Q. Now, during this 30 minutes of conversation you had one series of conversation about returning his records? A. Yes.

Q. Wherein he talked about he would be out of business; is that right? A. Yes.

Q. Now, were there any other conversations on any other subject? A. Well, there was on this—primarily it was concerning him. The conversation was as to the FBI's interest in gambling. I commented that "We wouldn't be here if you would bet locally rather than interstate." And he says, "I can't bet locally."

And I said, "Why not?"

And he said, "Because the bookmakers in Los Angeles won't pay off."

And then I asked him—do you want more?

76 Q. That's another conversation you remembered? A. Right.

Q. Do you remember any conversation about money? A. Yes.

Q. Did he make some complaints that he had lost some money? A. When he came in the door I pointed out to him that Special Agent Rockwell who assisted in the search had found two $100 bills in his pocket, this pocket of a coat hanging in the closet. I said, "I have already made out a slip saying that this was found and recorded the numbers appearing on those two $100 bills. I am going to leave it with you." He immediately went to the coat, looked in it and says, "There was more." And I says, "There was not more. That was what we found." And there was—it wasn't pursued any further.

Q. That was the end of that conversation? A. Yes.

Q. By the way, you didn't take the two $100 bills, did you? A. No, sir.

Q. But you took two rolls of quarters? A. Right.

Q. Is there any particular reason why you would take one form of money and not another one? A. Yes.

77 Yes.

Mr. Marks: I don't think I would be silly enough to aks about that.

Mr. Farber: I will ask the question for you, Mr. Marks, though it be silly.

Why did you take the two rolls of quarters?

The Witness: Because he was using large numbers of quarters to make his calls to Boston and to Maimi, and I felt that they were an instrumentality of the crime.

Mr. Farber: All right. I have nothing further of Mr. LaRue, your Honor.

Mr. Marks: May I ask one further question?

Q. Bettors usually use money to bet, don't they? That's the usual form of exchange? A. Money, yes.

Q. And it was your opinion that money that was found in bills would not be instrumentalities of the crime? A. It could have—go ahead.

Q. But that quarters which were used in the phone would be because the phone was used to facilitate the transmission of the information; is that correct or incorrect?

Mr. Farber: Objection, your Honor; argumentative; also asking for a particular conclusion of this witness.

Mr. Marks: Well, that was the question—

The Court: Well, it is. I don't know whether we
78 are interested in—he hasn't been qualified as an expert in this field necessarily. Sustained.

Mr. Marks: Thank you. I have nothing further.

Mr. Farber: The Government calls as its last witness Mr. Barron.

79 JOHN ROBERT BARRON,

called as a witness by the plaintiff, having been first duly sworn, testified as follows:

The Clerk: State your name for the record.

The Witness: John Robert Barron.

Direct Examination

Mr. Farber: Mr. Marks, is it stipulated between us that for the purposes of this proceeding only Mr. Barron is qualified as an expert in the gambling and bookmaking—

Mr. Marks: That's pretty broad. I will stipulate that he is an expert in the ways and means of gambling and bookmaking in the County of Los Angeles.

Mr. Farber: Your Honor, I would like to accept that stipulation.

The Court: All right.

Mr. Farber: I don't know if he is an expert gambler or not, your Honor.

Q. Now, Mr. Barron, have you come to a conclusion—excuse me. Let me ask you this question. Have you had an opportunity to review the tapes which were the basis for Exhibits 1 through 6, transcript of conversation overheard in the phone booth? A. Yes, I have.

Q. And likewise, have you had an opportunity to review the records which were taken from Mr. Katz' resi-
80 dence? A. I have had occasion to look at them, yes, sir.

Q. Now, from your observation have you reached a conclusion as to the activity that Mr. Katz was carrying on with respect to gambling?

Mr. Marks: Well, just a minute. Are we talking about from the conversations or from the exhibits?

Mr. Farber: Well, I am going to ask—I am going to ask him for his conclusion and then I am going to ask him what he bases it on so you will be able to determine—

Mr. Marks: I think his conclusions are irrelevant and immaterial for this proceeding because what we are trying to find out is whether the exhibits are admissible. So the only question is from the original transcript of the conversations, and then we can discuss subject to a motion to strike whether even those conversations are admissible for the agent to form his conclusion.

Mr. Farber: Well, to carry defendant's argument to a logical conclusion, your Honor, I couldn't ask the question at all because I think he has also asked to suppress the conversations that were overheard from the phone booth. I am asking this question subject, of course, to a motion to strike if—

The Court: We can't very well suppress evidence unless we know something about it. I think to rule on some of these motions now would be a bit premature and
81 would be ruling on the motion.

Mr. Marks: All right.

The Court: The objection will be overruled, it being understood, of course, that the court is making no determination at all with respect to the propriety of this seizure.

Mr. Marks: Thank you, your Honor.

Mr. Farber: Thank you, your Honor.

The Witness: I want to see if I clearly understand the question. Is it that in the review of the tapes, the transcripts of the tapes, did I come to any conclusion when com-

pared with the records that were seized following the arrest and search?

By Mr. Farber:

Q. As to the occupation of Mr. Katz. A. Yes. Conclusion-wise from what we—from what I read on the basis of what he was—his conversations with Boston and Miami, and in particular with this conversation to Boston he made statements in the transcript—

Q. Excuse me. Will you tell me what your conclusion is first, and then I will ask you— A. I was of the conclusion that he was, one, wagering for himself and others, and, two —I will restrict myself to the conversations—and, two, that on the basis of these conversations he was writing in the phone booth at the time of the call. I concluded from
82 these two things, the transcript and his writings, that he was keeping records of these bets for himself and for others.

Q. Now, is there a term in gambling parlance for a person who bets for others? A. A commission man, I think they call it. I am certain they call it a commission man.

Q. Now, would you take a look at Government's Exhibit 13, please, sir. A. Yes.

Q. What is Government's Exhibit 13? A. It is a section of a line sheet, sports sheet, marked Thursday, February 25th, on which there is pencil and ink writings.

Q. Can you determine what type of records they are or it is, I should say, since we are talking about only one? A. It lists basketball teams which were written in in longhand. And the line—the line being the amount of points allotted to the favorite—I mean, to the underdog, if it is a minus system or a plus system, the point spread of that game, plus circled notations, for example, plus 4 which would be circled and the 10. There are penciled notations at the bottom, 884, for example, 1733, which I believe is a telephone number in Boston.

On the back side is the notation Elly with 26.70,
83 and Bl with $3.00. Would you like my opinion on this record?

Q. Yes. A. On the back side the Elly and B1 would be called to Elliott Paul Price of Boston, Massachusetts, a bookmaker there. And B1 would refer to Blabs Romash

who is a Miami bookmaker, and the amount that he owed to each on the basis of bets made.

Q. Now— A. The front section would list—now, I cannot testify with accuracy as to the full notation made on the front side.

Q. Well, then, let's—I won't ask you the question.

Now, with respect to Government's Exhibit 7, do you have an opinion as to what Government's Exhibit 7 is? A. These are individual sheets for each major collegiate basketball team, listing the team in the upper left-hand corner, listing the players of that team. It goes from Alabama alphabetically all the way through, at least at first blush it would look like every major collegiate team, listing the players along the left-hand column. And along the top he would start a column for their opponents.

He then charted each individual player, his height, what year of college he was in and what the points that he had scored against the team that he had played in the top.

For example, if Andrews for Alabama scored 10
84 against Duquesne—and I know that—I can't read all these—

Mr. Marks: I think the exhibit speaks for itself.

Mr. Farber: I think so.

The Witness: Yes.

By Mr. Farber:

Q. I think that is correct. Rather than going through and reading the exhibit, what in total are these exhibits? How would you characterize them? A. I would characterize these as—incidentally, I would like to qualify that one statement. He has a total figure that he puts at the top which is a circled figure, numerical figure. These are handicap records for each team. He gives them a designation. A numerical designation when compared with the numerical designation on another team, he would come out with who was favored should they play on a neutral court.

Q. Thank you. Excuse me just a moment.

Mr. Farber: Your Honor, in the interest of saving the court's time, the Government and the defense will stipulate that Mr. Barron will testify if asked the following questions, and it is deemed for the purpose of this stipulation that the questions have been asked—

Mr. Marks: Right.

Mr. Farber: —that he will characterize each and
85 every exhibit in the manner that it is entitled in the exhibit register. Is that a clear statement for a stipulation, your Honor?

The Court: Yes.

Mr. Marks: So stipulated.

The Court: May I see the records?

Mr. Marks: For the purpose of this hearing.

Mr. Farber: For the purpose of this hearing.

The Court: Have you got a copy here?

Mr. Farber: Yes, your Honor. I believe I provided the clerk with a court's copy.

I have no further questions of the witness, your Honor.

Cross Examination

By Mr. Marks:

Q. Mr. Barron, let's start at the beginning. From the telephone conversations that were recorded you formed an opinion, did you not, that Mr. Katz was placing bets? A. Yes, sir.

Q. Didn't form any opinion that he was bookmaking in those conversations, receiving wagers and paying out moneys to persons from the odds on their wagers? A. Mr. Marks, I concluded that Katz from a look at the records was betting for himself, betting for someone else.

Q. Let's talk about the transcripts of the tele-
86 phone conversations you heard. A. That's what I am talking about.

Q. Those alone you reached a conclusion that he was betting for somebody else? A. Yes, sir.

Q. From his telephone conversations? A. Yes, sir.

Q. Now, when you say betting for somebody else does that mean that he was receiving—were you able to conclude that he was receiving a commission from that or that merely there may have been somebody who was joining in with him in the placing of a bet? A. May I—in answer to your question, I could not make that determination.

Q. All right. So the word "commission man" is not an accurate description of what you could determine from

those—at least those transcriptions of the telephone conversations, because a commission man get a commission for placing a bet if the winner wins; isn't that correct? A. Are you asking that question, sir?

Q. Yes. A. No.

Q. What is a commission man? A. A commission man works varying ways. It used to be referred to that
87 they would receive a commission for moving money.

A commission man is an individual who will—who has what they term outs who can move money and who will move the money. All he gets for gratuity is that someone will type into him what they call steam teams which he will then bet on with the favorite. In other words, he does this in order to receive the information.

Q. Mr. Katz is a handicapper, isn't he? A. Yes, sir.

Q. He is the one who makes his own determination as to what team should be—what kind of bets he should make? A. In Mr. Katz' case?

Q. Yes. A. I have nothing that would go against that.

Q. Well, his records show 30 years of teams that he has recorded himself, don't they? A. Yes, sir. I don't know if it is 30 years. These records reflect specific years that these teams were plotted. It certainly doesn't go back 30.

Q. But it goes back several years? A. Yes, sir.

Q. Now, these yellow sheets which are Exhibit 7 are equivalent to your forms in the race track, aren't they? You go to the race track and you get a racing form, it shows how many races the horse has run before, how many times it has run, what it run against other horses in
88 the race; isn't that right? A. Well, I have seen the printed forms. I have not—these are handicap records. If those are handicap records then they are alike in that this deals with sports.

Q. Right. All this does is list in Mr. Katz' handwriting teams, the players on the teams and how the teams performed against one another over a period of years; isn't that correct? A. That's correct.

Q. And what players were on the teams and how the players performed? A. That is correct.

Q. And from that Mr. Katz, in your opinion, put a number on this in which he rated a team? A. That is correct.

Q. And it is a numerical record, and that's all it is, right? A. I don't know if that's all it is. It is certainly that.

Q. Now, getting back to our other question about the telephone conversations, the tape recordings, the only conclusion you could arrive at in fact is that Mr. Katz was betting. Whether or not he was a commission man in the way you have described is something you couldn't really determine from those conversations; is that correct?

89 A. I knew—I definitely knew he was betting for himself and for someone else.

Q. All right. A. Yes, sir.

Q. But you didn't know whether he was betting for someone else in terms of receiving remuneration for it or whether he was just adding somebody's bet to his to place it; is that correct? A. Not on the tapes, no, sir.

Q. So then you couldn't classify him in your own mind as a commission man at that point; right? A. From a review of the tapes, no, sir.

Q. And from a review of the tapes you couldn't classify him as a bookmaker, could you? A. I couldn't classify him as a commission man, but I couldn't delete him as one.

Q. All right. How about a bookmaker, could you delete him as a bookmaker from the tapes? A. Technically, yes, sir.

Q. All right. A. I'd like to correct my statement. Any time in our mind an individual bets for someone else, he is moving money which technically is moving for someone else, he can technically be termed a bookmaker.

Q. Well, a bookmaker is defined, isn't it, in the

90 Code as one who is in the business of receiving wagers? A. Yes, sir.

Q. Now, did you believe at that time that Mr. Katz was in the business of receiving wagers? A. He received a wager which he moved for somebody else, yes, sir.

Q. At the time that you saw those tape transcriptions did you believe that Mr. Katz was in the business of receiving wagers? A. I could not make a determination.

Q. All right. When you saw the exhibits after the search did you believe that he was in the business of receiving wagers? A. I can't make a statement on that fact. I did not review them with that in mind.

Q. Did you help conduct the search, by the way? A. No, sir.

Q. Now, many of these exhibits that were seized are matters that came out of newspapers and magazines; is that correct?

Mr. Farber: May we be specific on that question, counsel?

Mr. Marks: All right.

Q. Exhibit 9, pro football handicap sheet, was that from a newspaper or was that on the written sheet?

91 A. These were on written yellows dealing with football.

Q. Sports sheet, Exhibit 10, wasn't that from a newspaper?

Mr. Farber: I think the—

The Witness: I'd have to look at the exhibit, sir. I don't know.

Mr. Marks: Yes.

Q. Look at that. A. That is a sports sheet put out locally for the purpose of entering your line and teams.

Q. Now, you have seen all the exhibits so far, haven't you? You have gone over them? A. I have reviewed them but not the way you are asking the questions. We have an expert—

Q. Well, aren't they matters taken from newspapers and magazines regularly printed every day, handicap sheets? A. We picked up some magazines. I don't know, the notations he made on here, where they came from.

Mr. Marks: I believe that's all.

Redirect Examination

By Mr. Farber:

Q. Mr. Barron, you have said in your opinion that Mr. Katz was a commission man. You say you can't make that determination solely from the transcript. Is that

opinion also based on a review of the records?
92 A. I believe, sir, that the—I would be testing—testifying in that regard in hearsay evidence from the standpoint of information told to me by our expert.

I, in looking at the tapes, and from, I mean, the transcripts of the tapes and comparing his statements and his notations reflecting amounts of money owed, what appeared to be owed to him, it was my conclusion he was betting for himself and for other individuals based on information that he provided and provided by them.

Therefore, under my definition he would be referred to as a commission man, yes.

Q. Well, would you take a look—

Offers in Evidence

Mr. Farber: Your Honor, I don't believe I moved, and I think I should at this time, move that Government's Exhibits 1 through 6 be received in evidence for the purpose of this proceeding.

Mr. Marks: No objection for the purposes of this proceeding.

The Court: They will be received.

(The exhibits marked Plaintiff's Exhibits 1 through 6 were received in evidence.)

Mr. Marks: Except the general objection that they were obtained illegally.

The Court: Yes.

93 By Mr. Farber:

Q. Would you look at Government's Exhibit 1? A. Yes, sir.

Q. Now, Government's Exhibit 1 refers to a conversation on February 19, 1965, does it not? A. Yes, sir.

Q. Now, in the body of that conversation does that conversation itself indicate whether or not Mr. Katz is engaged in betting with others? A. Betting with others?

Q. Or for others? A. Yes, sir; both. On both instances it would be true.

Q. Does it— A. He—

Q. Does it indicate how he is getting his recompense? A. In this exhibit?

Q. Yes. I'd like you to read the section that does apply so that we are getting the exact words before the court. A. May I explain the—the text of this in order not to read it in its entirety?

Q. Yes. A. A phone call was made on February 19th to Boston, Massachusetts, in which Mr. Katz had a conversation telephonically with someone in Massa-
94 chusetts. He stated there was, in general terms, a disagreement with the individual being called over an amount of money that he wanted to straighten out with him. And he—he was sort of angry therein.

He said, "I could have saved the eight dollars. What are you going to do with it?" And apparently he was then told that he would receive a call, which he did receive. It was made from someone out of—in that area to him at his phone in Los Angeles.

And in conversation with this individual he discussed this dispute. Apparently the dispute centered around the fact that he was giving a wrong line.

He then went on to explain that this is not—"This isn't my business. It isn't my play. I take a piece at a dollar or two."

Q. You use the term "eight dollars" and "one dollar." Do you know from your experience of investigating and making cases, does one dollar mean literally one dollar?

Mr. Marks: Well, I will object to that as beyond the scope of the expertise, your Honor. Whether one dollar means a dollar or doesn't mean a dollar, I don't think any expert can testify to that.

Mr. Farber: Your Honor, as an offer of proof I respectfully submit that there is a certain system in which—

The Court: Objection will be overruled.

95 Mr. Farber: Thank you.

Q. Have you ever heard of a nickel system? A. Yes. A nickel in placing a bet would refer to five hundred dollars. Eight dollars would be eight hundred dollars.

Q. When you said a nickel would refer to five hundred dollars, did you misspeak yourself? You said five hundred. Did you mean fifty? A. No. A nickel would be five hundred dollars on a bet.

Q. All right. A. And a dime would be a thousand dollars. When you are speaking of in between it would

be seven dollars would be seven hundred, eight dollars would be eight hundred.

Q. All right. Thank you. Now, would you continue with the conversation which you are reading? A. I was referring to a conversation in which he was called in Los Angeles—his call to Boston in which he explained to the calling party that it wasn't his business, this was the claim that he was making with this book. "I take a piece at a dollar or two—the fellow I am playing he is behind." And then he goes on to state that he—of the amount owed, eight hundred and some is owed to another individual.

Then the conversation continues. Then he said,
96 "What are we going to do? I think it is the fairest thing. I am going to pay the guy—so help me."

If you took this thing in sequence, he was trying to get credit for the amount that the book claimed in Boston that he owed. He was explaining to the calling party that all of the money owed was not his, that some of it belonged to another individual, and that if credit is given to him he will pass it along to the individual who he is playing for.

Q. Now let me ask you another question, Mr. Barron. When the recorder picked up conversation—we have used the term conversation. Did you pick up both ends of the telephone conversation or just Mr. Katz' words? A. At no time did we pick up the other party's conversation.

Mr. Farber: Thank you. I have nothing further, your Honor.

Mr. Marks: Nothing further.

The Court: You may step down.

Government Rests

Mr. Farber: The Government rests, your Honor.

Mr. Marks: Would you like to hear argument of counsel now?

The Court: You have no further evidence at this time?

Mr. Marks: No.

97 The Court: Before we listen to any arguments I think we will take this other matter.

(Other matter heard.)

The Court: Now, gentlemen, do you want to proceed with the motion?

Mr. Farber: Your Honor, prior to proceeding I had one thing called to my attention. It is purely an administrative matter. The Federal Bureau of Investigation has asked the court's indulgence. I understand from the agents that they are somewhat disturbed whenever there is an allegation of impropriety on the part of an agent such as an allegation that certain money was taken. They are under an obligation to refute that statement at the time that it is made if possible.

Mr. LaRue would like to state under oath that no money was taken, if he may do so at this time, to comply with the Bureau regulations.

Mr. Marks: Your Honor, before this is taken any further, the only question that I asked Mr. LaRue was whether or not he recalled any other conversations about money. There was no allegation of improperiety made.

The Court: Well, he took the 25 cents.

Mr. Marks: That's listed on the inventory.

Mr. Farber: I think there is an implication which the agents for their own records—it is not germane to
98 this case, and that's the reason I asked the court's indulgence. It is not germane to the case, but for the agent's own—

The Court: Very well.

Mr. Marks: I am glad to indulge the agent. I just wanted the record to be perfectly clear that the questions did not allege any impropriety nor at this time do we allege any impropriety.

Mr. LaRue: I just want to clear the inference there. I think that will take care of it.

The Court: That will clear the inference?

Mr. LaRue: If the record shows he is not making any allegation of—

The Court: Impropriety?

Mr. LaRue: —impropriety or anything taken other than what was on the inventory sheet.

Mr. Marks: Yes. My questions, again, did not mean to infer an impropriety or an allegation of taking. It was a question relating to conversations had about money.

Mr. LaRue: Well, the conversation was an allegation that there was more money than what I said was there.

Mr. Marks: All right.

Mr. LaRue: If you are withdrawing the inference that there was more there than—or denying that there was more there, fine. Otherwise I am stating under oath that there was no more than what I stated, and nothing more
99 was taken than what was on the inventory sheet.

Mr. Marks: I will accept the statement of the agent so made under oath.

Mr. Farber: I think he has previously been sworn.

Thank you, your Honor.

Argument on Behalf of Defendant by Mr. Marks

Mr. Marks: If the court please, the motion here is a little bit involved in that it concerns two or three different aspects of the laws of search and seizure.

The first and primary portion of the motion that we have to get to which, if granted by the court, would dispose or be dispositive of all else, I believe, is, to wit, the conversations overheard by means of recording devices through the telephone company. Because without them —and through the telephone booth—without them I think the court can recognize that the affidavit of probable cause, the affidavit in the search warrant would have no probable cause to show any violation absent the content of the conversations had, because what they would have is the following state of affairs: Information of some nature that Mr. Katz associated with a bookmaker who was from New York; No. 2, Mr. Katz made phone calls; No. 3, that the phone calls were to Boston, Massachusetts, to a person who the agents know as associated with known bookmakers.

I believe that is the content of the affidavit. If I am mistaken, fine. But that, as far as I can under-
100 stand, is what is involved here.

Now what they have is, absent the conversations of Mr. Katz, information of an association based upon telephone calls to persons who are again associated. Nothing to establish that any crime has been committed, bookmaking, wagering or any other offense.

So now in order to sustain probable cause, if they have probable cause, is to overhear by electronic means a private conversation. The question before the court is whether or not this type of invasion of the privacy and invasion of a private conversation is in violation of the Fourth Amendment.

I suggest to the court—I am not going to reargue what I stated in my points and authorities for I think they are perfectly clear. I think that Olmstead is a dead letter. It hasn't been specifically overruled, but either by this case or some other case it is going to be in the very near future.

I base that primarily upon, I think, the Hurst case which is out of the Ninth Circuit. It is quite in point. That is that the right to privacy, a violation of the right to privacy is a violation of the right guaranteed by the Fourth Amendment. The right to privacy doesn't just extend to a person's home, it extends to his office, and I believe it extends to any place in which there is intended to be privacy.

101 I can point to the court the cases which are cited in Hurst. I think it is either Belickey or Britt v. Superior Court which came out of the State court. These were cases where the police officers peered into men's rooms enclosures, private enclosures through peepholes that they had into a private receptacle with a door. The California Supreme Court in these cases said no matter how transient the nature of staying in a private toilet is, nevertheless once a person is there he is entitled to privacy and he is entitled to be free of unwarranted and unlawful intrusions by agents.

I believe it means whether by their peeking in through a peephole or whether they take a device which is in fact a physical violation of the privacy. Because what it is doing is taking the sound waves which are a physical manifestation which otherwise would not travel outside the phone booth, magnifying them, amplifying them, and then recording them in a place where quite obviously the person intends to be private and not overheard.

The fact that the telephone company gives them permission to attach the sound, the recorders to the side of

the telephone booth is of no moment. The permission, I think this is quite clear, has to come from the person whose conversations are being recorded.

So, if that's—that is ruled in favor of the ap-
102 plicant, then everything else must go by the board.

I believe that the conversations were the probable cause upon which they could obtain a search warrant.

Now, going to the search warrant, we have a second question which I think is much more important and that is: What did the search warrant authorize them to obtain? Now, I submit, your Honor, that what they had was evidence that Mr. Katz was betting, and that they had evidence that Mr. Katz was betting, assuming it is admissible, across state lines by the use of a telephone.

Now, the search warrant reads that they are looking for bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings, which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, which is what we are here on.

And violations of Sections 4411, 4412 and Section 7203 of the Internal Revenue Code.

Now, what they were doing, your Honor, I submit to you, is instituting a search for evidence pursuant to the search warrant to establish the crime of bookmaking, which they were not permitted to do because what—they had all the evidence they needed. The further search was
103 an exploratory search, and it was a search for evidence. They sort of run into one another, the Fourth and Fifth Amendments. They cannot be distinguished.

Here the officer, I believe it was Officer Barron who wrote out the search warrant, admitted that from the information he had that's all he could determine was that the man was betting. Now they are searching for means or for matters which are designed and intended for use as means of committing other criminal offenses, bookmaking, violations of the IRS, Internal Revenue Code. This is an evidentiary search and evidentiary searches

are condemned, they are unlawful. The warrant cannot stand on that.

Furthermore, it is an exploratory search. It goes beyond the search. In fact, it went beyond what the search warrant allowed them to take.

They went through the entire records. They took magazines, they took money, which in the abstract I assume you can say is a way in which you place a bet. In other words, you can't do it without money unless you have some sort of credit card arrangement with a bookmaker.

But nevertheless money in and of itself is not criminal. And it can't be taken, I don't believe, pursuant to a search warrant.

The only thing that you can do is state that there was a certain amount of money. But to enable an agent
104 to take money from a person because he is a bettor, it goes beyond the scope of a permissible search.

Exploratory in that sense means by taking completely innocent matter such as newspaper articles and clippings. I believe it was an exploratory search.

And we get down to the final question, I guess, that Mr. Farber has argued, and it is a very interesting question but I don't think it applies here, assuming that you have a valid search warrant and assuming that they only took—they were not searching for evidence but they were searching for instrumentalities of the crime, the question is, what are the instrumentalities of the crime of being in the business of betting and use the telephone. I submit that the only instrumentalities of the crime would be the telephone because it is not a crime to be in the business of betting. The crime is that if a person is in the business of betting and uses the telephone and transmits the messages, the betting information, then he is guilty of this crime denounced by 1084.

I don't believe that you can by saying, using a word "instrumentality," transforms a search for evidence that he is in the business and say (a) we found the evidence that he is in the business, now we will call it an instrumentality. Because that is not what an instrumentality of the crime is. The man had some of these records for
105 years and years and years. I think it is quite well established. They aren't the instrumentality of placing

a telephone bet, transmitting information. They aren't the instrumentality of any crime. They are merely evidence to show that if he did place the bet or did transmit wagering that he was in the business of doing it.

Therefore, I say that the search warrant was too broad, too general. It was a search for evidence, not for the instrumentalities or means. They are certainly not contraband. None of the items that were taken were contraband.

They are certainly not the fruits of the crime. So what you are talking about is if it was a search for evidence it is invalid. If they picked up true—if they picked up matters which are outside the search warrant—and it is too general, it is exploratory, it allows the agent his total discretion as to what to pick up—it must be suppressed.

I believe that under any of these tests the items seized, the conversations had over the phone, I would perhaps go so far as to insist that—well, I was thinking about Mr. Frei and his ears to the electrical outlet.

The Court: I didn't work, though.

Mr. Marks: Pardon me?

The Court: It didn't work very well.

106 Mr. Marks: He didn't get any shocking conversations, in any case. I just don't believe that if you read thes ecases about the astounding advances of electronic equipment that the Supreme Court or this court can allow it to be said that now if you can stand away from a person's home and beam into the very innermost recesses of his home and pick up incriminating conversations that he has had that it is perfectly all right as long as they don't dig into the wall. I think that it gets to be a horrifying situation.

I think the justices of the Supreme Court have discussed that and with quite some trepidation as to how far they are going to let invasions into the home go through the use of electronic equipment which—science is wonderful but how far can we let it go?

Thank you.

Argument on Behalf of Plaintiff by Mr. Farber

Mr. Farber: Your Honor, this defendant, of course, is charged with violation of Title 18, USC, Section 1084, in that anybody who is engaged in the business of betting or wagering and places interstate telephone calls in the carrying out of that activity, if such activity can be proven, is guilty of that charge.

Now, we agree with defense counsel that if the telephone conversations and the records are suppressed—or if the telephone conversations were suppressed that the search warrant must fall and the items seized would not
107 properly be before this court.

But it is our position that those telephone conversations were taken properly, were overheard properly; that there was no violation of the Fourth Amendment.

I had the feeling while I was listening to defense counsel that he was speculating as to what the law might or might not be some time in the future. Of course, it is very interesting to discuss what the law might or might not be in the future. But as an attorney representing the Government—and I respectfully submit this court as a District Court is bound by the law as it presently stands —is fairly clear.

Goldman v. United States, which is the landmark case, a Supreme Court case decided in 1942, 316 U.S. 129, has been cited again and again for the proposition that provided there is no electronic device that has been planted by an unlawful physical invasion of a constitutionally protected area, then there is no violation of the Fourth Amendment.

In Goldman the facts were these, your Honor. Special agents of the Federal Bureau of Investigation had information that certain violations pertaining to the bankruptcy laws were taking place. They had an informant who was working with the investigators.

A meeting was set up in the office of the defendant.
108 The special agents of the Federal Bureau of Investigation took the room right next door to the office of the defendant, and just, as in this case, they planted a microphone against the wall of the office belonging to the defendant without penetrating into the wall in any

manner whatsoever. By use of this device they picked up the conversations that were emanating from the office that belonged to the defendant.

Of course, in that case the conviction of the defendant was attacked in the Supreme Court. But the Supreme Court upheld the conviction on the ground that there had been no trespass on to property belonging to the defendant and that there had been no physical intrusion.

Basically, the decision in Goldman was bottomed on the very famous case of Olmstead v. United States.

Now, defense counsel says that Olmstead v. United States is a dead letter and it has no vitality. But I don't think that the majority of the Supreme Court agrees with him.

For instance, in Lopez v. United States the majority opinion was written, and these words were said at pages 438, 439 of 373 U.S. This is a 1963 case, your Honor.

"The court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been be-
109 yond the reach of the human ear. See, e.g., Olmstead v. United States, Goldman v. United States."

Citing the two cases we have just discussed.

The court continues:

"It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area."

Then in contrast the court mentions Silverman v. United States. Silverman v. United States, I think that's quite a famous case. That is the case where a spike mike was actually driven through the wall into the defendant's house. The spike touched a heating conduit and in effect turned the whole house into one large woofer and tweeter. Conversations throughout the whole house were picked up by the agents.

The conviction in that case was reversed on the ground that the spike mike going into the wall and touching the heating conduit was indeed a physical intrusion into the property of the defendant.

So we respectfully submit that the first ground for upholding the activity that was carried out in this case is the rationale of Goldman v. United States; that the procedure used by the agents went no further than that in Goldman.

With respect to Goldman, this Ninth Circuit in
110 People v. Benson, 336 F. 2d 791, Ninth Circuit, 1964, in synthesizing the electronic eavesdropping problem again cited Goldman as the law of the land.

Now, of course, there is a second and separate ground upon which we can uphold the procedure that was followed with respect to the telephone booth and that is on the ground that in any event a telephone booth is not comparable to a home or an office; that there are or may be certain constitutionally protected areas but the whole world at large is not a constitutionally protected area.

There are degrees. When you drive a spike mike into a wall and overhear conversation in a home you are running the risk that you are going to be prying into the most intimate secrets of a family. This risk, of course, is lessened to a great deal not only quantitatively but, I think we can say, qualitatively when you are dealing with a phone booth as opposed to the house or home.

A man when he uses a phone booth runs the risk right to start with that the words he uses will filter through the thin walls and door of that phone booth and be picked up by people who are passing by, who are standing outside of the phone booth.

Now, in United States v. Borgese which is a Federal Supp. case, your Honor—it is 235 F. Supp. 286, Southern District of New York, 1964—of course this case
111 would not be binding on this court but it is good persuasive authority.

In that case the facts are strikingly similar in that an investigation was commenced and it involved the defendant's use of a phone booth.

There is one difference in that in Borgese the agents went much further than they did in this case in that they planted a microphone underneath the table inside of a phone booth and actually penetrated into the interior. But the District Court refused to suppress the conversation

overheard in that manner on the ground that a telephone booth is not a constitutionally protected area, and the area in which privacy is guaranteed is essentially the houses and the homes of people. And the houses extended as far as their offices.

But the court specifically declined to go further and make a telephone booth a constitutionally protected area.

Now, with respect to the search warrant, your Honor, we respectfully submit that it is true that much of the documents that were picked up by the agents in this case were indeed evidence. But that does not necessarily mean they should be suppressed, because they have a second characterization and that is not only are they evidence but they are instrumentalities of the crime.

Now, Mr. Marks has stated that the crime is the use of the telephone for placing wagers in interstate
112 commerce by one who is engaged in the business of betting so, therefore, the only thing that should be suppressed is the telephone. Now I think that is somewhat of an oversimplification of the problem because, after all, merely using the telephone alone is not criminal, it is the whole activity conjoined.

And for the activity to be criminal not only must the telephone be used but a man must be in the business of betting.

Now, in this case the records that have been seized are vital to the defendant's occupation as a bettor. He himself has admitted that. He admitted that to three FBI agents.

Without those records this man could not engage in the business of betting which, of course, is one of the elements of this crime. And if he were not a bettor, he could not be—and if he could not engage in the business of betting he could not use that telephone to place interstate calls.

Now, in Marron v. United States, your Honor, a Supreme Court case, 275 U.S. 192, certain records were seized from a bootlegging operation. Of course, the same—essentially the same objection was made in that case as was made here that the records themselves were not instru-

mentalities of the crime, but the court had this to
113 say, and listen to the type of records that were taken.

The court said:

"The bills for gas, electric light, water and telephone services disclosed items of expense; they were convenient, if not in fact necessary, for the keeping of the accounts; and, as they were so closely related to the business, it is not unreasonable to consider them as used to carry it on. It follows that the ledger and bills were lawfully seized as an incident of the arrest."

Likewise, in this Circuit, in Leahy v. United States, Internal Revenue agents were interested in suppressing a bookmaking operation, and the court at that time said:

"It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime."

And then the Ninth Circuit cites Marron, the case we just discussed.

And then in parentheses:

"(officers incident to arrest may lawfully seize account books and papers used in carrying on the criminal
114 enterprise.) Such were the records obtained in this case."

Now, your Honor, in the case at bar the records seized were handicap records. They were the records which enabled this defendant to carry on his occupation, that of a bettor, the only occupation that he says he knows. For that reason we do respectfully submit that they are instrumentalities of a crime.

Mr. Marks: Very briefly, your Honor.

I appreciate the Government's candor in its memorandum of points and authorities indicating the Ninth Circuit cases which I believe are controlling here with relation to whether or not these are instrumentalities and whether the search was a little bit too broad. However, the Gov-

ernment's statement of the effects of the Olmstead, Silverman and the Lopez cases, I think, stretches the case a little bit.

Now, the Government cites the Lopez case. If the court will remember, Olmstead was the attaching of the microphone outside of the house, hearing the conversations. In 1942 they said, "Okay." Now along came Goldman Goldman turned the house into a—if my memory is correct, because perhaps it was Silverman—do you remember?

Mr. Farber: Pardon me?

Mr. Marks: Which one was it where it turned the house into a loudspeaker?

115 Mr. Farber: That's Silverman.

Mr. Marks: Goldman cited Olmstead and went no further. There was a large dissent in Goldman.

Silverman now says that we won't have to decide the question which has been raised here about the unlawful invasion of privacy in overruling Olmstead because irrespective of what Olmstead has said here was a physical invasion of the property. So we don't even have to talk about Olmstead.

This was a clear violation of the Fourth Amendment. So right now they are eroding away Olmstead. We are not going to reserve it, they are saying, because this is not before us. This is how the Supreme Court works. Perhaps it is wrong, but that's the way they do it.

They talk about the question they have got at hand.

Now we get to Lopez. The question raised by counsel in the citation is incomplete because it goes on. It is very interesting. The court—and this is at page 438—

"The court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear."

They cite Olmstead and Goldman.

"It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a
116 constitutionally protected area." Silverman v. United States, supra.

The validity of these decisions is not in question here. Again they are sidestepping the decision, because in Lopez what happened was—I will read on. Indeed this case involves no eavesdropping whatever in any proper sense of that term. The government did not use an electronic device to listen in on conversation it could not otherwise have heard.

Instead the device was used only to obtain the most reliable evidence possible of a conversation which the government agent participated in.

So what the Supreme Court is saying, they are saying in Lopez that whatever the vitality again of the old cases where they sustained electronic eavesdropping, in Lopez the agent was invited in, he walked in, he had a conversation, he had a transmitter on him. They said in Lopez that all he was testifying to was what he overheard and what he was lawfully entitled to overhear. Just because he happens to make an electronic transcription of it which is more reliable than his recollection, we are not going to refuse that.

But they do state that they—the question of eavesdropping is the crucial question, and the crucial point is, did the government pick up a conversation by use of electronic eavesdropping which they would not otherwise be entitled to hear and which they were not invited in to hear.

117

The question is the sense of privacy. I believe as I say, your Honor, the only way I can read the cases is that even though they—the Supreme Court declined to rule on Goldman does not—and they say we won't go beyond it a fraction of an inch does not mean that the —that any court and any attorney just reading the cases knows what the law is today.

The law is today as far as I can determine that an individual has a right to privacy. And you determine the right to privacy with respect to electronic eavesdropping as to when the government agent has the right to—is attempting to overhear something which by electronic device he could not otherwise have had the ability or the right to listen in on or at least in some way utilizing this

increased power of hearing to get into private areas where he shouldn't be.

I don't know about this New York case. As far as I am concerned it is totally and 100 per cent wrong. But at least, as I say, this is the best I can tell you about the Supreme Court case.

Again, because the items are primarily evidence and, secondarily, they are instrumentalities, I think begs the question. The question is was there a search for evidence and are they in fact evidence?

118 Instrumentalities of a crime, as far as I am concerned are—have a very peculiar and straightforward definition. It may vary, but they are the items which have to be used necessarily to perpetrate the particular crime which is involved.

In the Harris case which is cited. I believe, the government agents were searching for checks and they came across a draft card. The search was sustained only on the basis that the draft card itself was contraband and it was part of the search. They came across it lawfully. They were under a duty to take the contraband. So that it relates back to the original search.

I thank the Government, they admit it's evidence. That's what they were searching for, they were searching for evidence of bookmaking when they didn't have the remotest probable cause to believe there was. The search warrant reads like a bookmaking search warrant where they are trying to find a violation of the Internal Revenue Code which is not involved here.

Here the simple proposition is, your Honor, you have a person who bets. If he uses the phone and bets and goes across country no crime, no crime. The only time it is a crime is his business is betting. And unless the agent can come across a different method then by a search warrant to go into the private papers to find evidence of

119 what the man's business is they don't have a right to search for that evidence.

It is not the crime of being in the business of betting, it is the crime of using the telephone if you are in the business. I think there was a search for evidence, and I think this should be all suppressed. I would ask the

court that at least if the court denies the motion, to inform the Government that the defendant has a right to make copies of his records, because assuming they are instrumentalities of the crime which I—arguendo, it is like a screw driver in a burglary, it is an innocuous weapon in itself, and it certainly is admissible into evidence to prove the crime of burglary. But once the case is over isn't the defendant entitled to have his screw driver back? It isn't contraband, it isn't to be forfeited.

In the same manner here, the defendant has the records assuming—I mean, the Government has the records. Isn't the defendant entitled to have copies of his own work product which are taken away from him? This is not a forfeiture case.

Mr. Farber: Pardon me, your Honor. That last point was not—I didn't have the opportunity to discuss that with the court.

Our position is this, your Honor, that the records themselves would be analogous to contraband in that not only were they used as instrumentalities for the per-
120 petration of this crime, but also in the State of California betting as such is criminal. A bettor who bets other than at the track commits a crime. For that reason we would not want these returned to the defendant because we would not want him to continue in the business of betting as such. For that reason we feel that they should not be returned to him in any event.

The Court: The matter will stand submitted and we will continue the disposition of it until a week from today at about this time.

Mr. Farber: Thank you, your Honor.

The Court: 2:00 o'clock next week.

Mr. Marks: The case that I called up on—or continued the matter for a week to this time, so I wonder if we could find some other date for it?

The Court: Well, it will only take a minute or so. I can have it at 9:30 or 1:30 any day next week you wish.

Mr. Marks: You say any day?

The Court: Would the 13th be all right?

Mr. Marks: Yes.

The Court: That will be all right. 9:30.
Mr. Marks: 1:30 or 9:30?
The Court: Let's make it 1:30. 1:30 on the 13th.
Mr. Marks: Thank you very much, your Honor.

(Whereupon an adjournment was taken at 4:00 o'clock p.m.)

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123 **Transcript of Hearing on Motion to Suppress Evidence**

LOS ANGELES, CALIFORNIA, TUESDAY, APRIL 13, 1965, 1:45 P.M.

The Clerk: Case No. 34715, U.S.A. v. Charles Katz, hearing court's ruling on defendant's motion to suppress evidence.
Mr. Marks: The defendant is ready.
Mr. Farber: Ready for the Government, your Honor.

Comments by the Court on Said Motion

The Court: Well, gentlemen, this motion to suppress the evidence, particularly the telephone conversations, raises a very interesting and exciting constitutional question, there is no doubt about that. It certainly presents a situation which is right in the field of law which is rapidly changing and which is in such a state of confusion at the present time.

It is pretty difficult for a court to know what the Supreme Court is going to do next. If I were to write an opinion as I first though I would do in this matter it would have to, of necessity, be lengthy and have to be an analysis of many decisions, many of which are Supreme Court decisions and many United States District and Circuit Court decisions which are certainly in hopeless confusion.

It would be a time-consuming task, and I doubt that it would help anybody but it would only add to the general confusion which already exists.

It seems to me that we have the pronouncement in
124 the Goldman case which indicates that if the court were of the same disposition—well, it is controlling

in this case so far as the facts are concerned, shall we say. The facts, I think, are about as close to the facts which we have here as we can get.

If the court were of the same disposition it was at the time it decided that case and were to consider this case, I think there would be no question but what the motion to suppress would be denied.

The trouble, of course, exists in that Mr. Justice Douglas has repudiated his decision in the Goldman case, and the Silverman case throws great doubt upon the basis which the court used in the Goldman case.

So just what the court would do if it had the Goldman situation presented to it again is doubtful. It is very probable that there would be a different result. I mean it is almost a pretty safe conclusion that it would be a different result. Whether it would be the basis upon which such a result would be obtained, of course, we can only speculate.

It seems to me that since the District Court is a trial court and it is our duty to follow the law as it is handed down to us, we must start with the Goldman case and say this is the pronouncement of the Supreme Court as it relates to this particular set of facts, and for
125 lack of a new and different pronouncement we are bound by it. And until the Supreme Court decides to abandon this line of thinking and set forth with more clarity what they mean in this field, this court ought to adhere to that ruling.

Well, there are a lot of things that could be said. I don't know if it will help anybody any more than to merely say that the motion to suppress the telephone conversation will be denied.

Now, the motion to suppress and return the items taken at the time of the arrest, in the first place we have a search warrant which has some general language, it also has some specific language.

Insofar as its specific language is concerned it is sufficiently clear and specific, and one reading it can ascertain what is meant by it. The articles can be identified if found. There are some articles in the list which I think come definitely within the warrant.

The police officers also are entitled to the scope which they would have upon a search incident to an arrest, which would be a broader scope. They have found and perhaps taken other articles within that power.

So I think that the search warrant is adequate as to some things and that the scope of the search insofar as it is made incident to the arrest is adequate as
126 to some articles taken, bearing in mind that there is a limitation.

As I understand the cases such as search must be limited to the instrumentalities of the crime and may not extend to matters which are purely matters of evidence.

In looking over the list of exhibits it seemed to me rather clear that most of the exhibits are exhibits which are in fact instrumentalities of the crime. They are the actual tools by which the defendant has engaged in the business of wagering, and which in this instance, having engaged in interstate transmission of bets, has committed the offense.

So going down the list of those items, I would think that items under 1, sub 1, 148 yellow legal-size sheets of lined paper—each bears names of colleges and surnames with numbers beside them in their column. Well, in fact everything down to—

Mr. Farber: Pardon me, your Honor.

Are you reading from the exhibit list or from the affidavit that is attached to the search warrant and the receipt that was—

The Court: I am reading from the report of Special Agent LaRue filed February 25th. It says, "The following items were seized by . . ."

Mr. Farber: Good. I just wanted to follow along
127 with the court. Thank you, your Honor.

The Court: Now, I would like to look at the newspaper clipping which is mentioned on page 2.

Well, first of all, this item of registration card issued by Las Vegas Police Department, I am sure I know what that is.

Mr. Farber: Your Honor, that is not an exhibit in this motion to suppress and we do intend to return that to the defendant.

The Court: And the newspaper clipping is the next item.

Mr. Farber: Likewise, that is being returned, your Honor.

The Court: A sheet of white paper with red handwriting on the upper left-hand corner.

Mr. Farber: No, your Honor. Let me see. That is undoubtedly an exhibit in this proceeding, is it not?

The Court: There is no indication that it has been marked as an exhibit.

Mr. Farber: I believe it is, your Honor. Probably not under quite the same notation as that in the receipt that the court is reading.

The Court: Of course, I have no idea what this is.

128 Mr. Farber: May I consult with Mr. Barron? I think we can probably assist the court and actually determine—

Mr. Marks: May I state something before the court finishes? In going through the affidavit the court seem to indicate that there may have been a search incidental to an arrest here.

Mr. Farber: Yes.

Mr. Marks: I believe Mr. Farber would stipulate that the arrest of the defendant was on the street away from his apartment, and the search had already commenced, or at least maybe at the same time commensurate with the arrest but not contiguous in time and place. In other words, the defendant was not arrested in his apartment, but was arrested away from the premises.

Mr. Farber: That much is correct, your Honor.

Mr. Marks: So if it is—

The Court: Well, now, the matters taken from the apartment were all taken as a part of the search conducted under the search warrant?

Mr. Marks: That is correct, your Honor.

The Court: It was only the things taken from his person, I guess—

Mr. Farber: One item taken from his person.

Mr. Marks: One item taken from his person.

129 Mr. Farber: Your Honor, if I may actually obtain the exhibits I think we can pick out the item that the court is interested in.

Your Honor, it is Government's Exhibit 9 that I believe the report is referring to.

The Court: Well, I think that, then, is proper. Now, that is something proper and is a result of the search under the warrant.

Now, then, the 2 rolls of quarters.

Mr. Farber: Your Honor, we have no objection to returning those, though I think arguably they are instrumentalities.

The Court: Then No. 5 on page 5, phone slips. I take it those are bills, are they? What are those?

Mr. Farber: Your Honor, I do not believe they are. Your Honor, Government's Exhibit 17 is one of those items.

The Court: I take it they are both of the same character.

Mr. Farber: Before I represent that to the court let me double-check and be sure that they are.

Your Honor, the phone slip dated 2-22-65 does not appear to be an exhibit marked for evidence.

The Court: I think it ought to be excluded.

Mr. Farber: Thank you, your Honor.

130 The Court: It seems to me to be a record of a phone call, and it is the phone call which would be the act and not the record.

The same thing would be true of both 5 and 6.

Mr. Farber: May I leave them on the clerk's desk, the ones that will be suppressed, so that we will not get them mixed up?

The Clerk: You keep them separate over there.

The Court: Leave them right here.

What is the hotel stationery notation?

Mr. Farber: Your Honor, that is No. 10.

The Court: No. 10 on page 3.

Mr. Farber: Your Honor, we would submit that this probably is evidentiary as opposed to—

The Court: It will be returned, then.

Legal-size cardboard with phone number listed here as 17.

Mr. Farber: Your Honor, I believe the evidence would show that that is a notation of the phone number called in Boston and as such would probably be an instrumentality.

Mr. Marks: More likely evidentiary.

The Court: Well, that, of course, is the problem here, most of this—all of it is evidentiary that will not be returned.

131 National Airlines ticket.

Mr. Marks: That has been returned, your Honor.

The Court: The envelope with markings, No. 13. I have no idea what that is.

Mr. Farber: I believe, your Honor, that that is a betting slip.

Mr. Marks: Just because I don't object, your Honor, doesn't mean I accede to this.

The Court: Very well. It will be retained.

Mr. Marks, we have gone through this with the Government. I know you would register the general objection to the entire group. Is there any one of these items which you feel is evidentiary and not an instrumentality?

Mr. Farber: Your Honor, for the record may I hand the exhibits to defense counsel so that he may have them in front of him?

The Court: Yes.

Mr. Marks: Your Honor, I have no way of determining from looking at something whether—in my opinion everything that has writing on it which are books and papers of this defendant in his private apartment are evidentiary regardless of whether or not—well, they just are not instrumentalities of this crime.

So in going through a particular notation I can't
132 either admit that it is evidentiary or deny that it is an instrumentality.

The Court: Well, I didn't want to put you on the spot, but I felt that if there was some glaring point here that you wanted especially to bring to my attention—

Mr. Marks: Assuming that the court rules they are instrumentalities, I may have a quarrel with the ruling. But I am not going to quarrel with the particular exhibits.

The Court: Very well.

With respect to the items which have been mentioned, if they have not already been returned they are ordered returned. The others the Government may keep as instrumentalities of crime.

Mr. Farber: Your Honor, may we have permission to return the items that are not present in court today to him? Mr. Barron will take care of that.

Mr. Marks: That is satisfactory, your Honor.

There was this other query we had before the court whether or not the Government could or would or should be ordered to return to the defendant copies of his exhibits. Assuming that they were allowed to keep the originals which they seized, and assuming these are instrumentalities, doesn't that mean that the defendant no longer can ever get these matters returned whether or not re is ac-
133 quitted or convicted?

Mr. Farber: Your Honor, if we may be heard on that point, it is an important point, and we would make a distinction, your Honor, between the hadicap sheets which we think are not only instrumentalities but, further more, contraband since they are really necessary for this defendant or any man to work in the field of betting. For that reason we don't wish to be parties to assisting the defendant in continuing that activity.

Of course, in the matter of preparation for trial we have no objection to defendant inspecting those documents solely so that he will be familiar again with what they are.

The Court: Well, unless there is some other order of the court they should be admitted, I assume, as evidence in this case and they would become a public record. I suppose anybody could go up and copy them.

Mr. Farber: Of course, the court could order that they be sealed.

The Court: We could order that they be sealed. But I don't think that I want to rule on that right now. I think that, after all, the defendant may be acquitted.

Mr. Marks: That's right.

The Court: In which event I think everything would have to be returned back to him.

134 Mr. Farber: It would depend upon the ruling of the court at that time with respect to the items. For instance, your Honor, if we have a narcotics case and certain heroin is—

The Court: But an article in the Sports Journal isn't per se contraband.

Mr. Farber: No. But, your Honor, just so we do make our position crystal clear, we are not talking about the

things that came from the Sports Journal, only the handicap sheets which the defendant himself compiled from records and which is quite a voluminous compilation by the defendant of handicap material. That is the only item that we would object to giving to them.

The Court: Well, I think any motion you have to release—insofar as it is necessary for the preparation of the trial and to the extent that you need anything for the preparation of trial, I think you are entitled to examine them.

Mr. Marks: Simply what we are asking for, your Honor, is for the opportunity, if we so desire, to make copies.

Now, according to the Government's theory, they are contraband and I go in and I copy down sheet 1 of the handicap sheet and I have now in my possession contraband. I think that is the most ridiculous assertion
135 tion I have ever heard in my life.

These are handicap sheets like the National Daily Reporter—not the Daily Reporter, the scratch sheet on a horse race. That's a handicap sheet.

It may be an instrumentality of the crime of bookmaking but it is not contraband.

Mr. Farber: According to the defendant's own statement to your Honor, it has taken him years and years and years to compile these particular records.

So I think that ridiculous or not there is some distinction between these records and Sports—

The Court: Well, gentlemen, the reason I don't want to rule on it now is that I am not sure enough of what we are talking about.

Now it is very possible that these handicap sheets, although they have taken years to prepare, are out of date.

Have these games already taken place?

Mr. Marks: They have. But the sheets contain the names of the players in prior games, and you sort of guess at how a new game is going to be played by how the old plays went.

The Court: Well, what is the motion? Have you made a motion of some kind?

Mr. Marks: It wasn't a formal motion. It was
136 sort of agreed between the U.S. Attorney and I that we would present the question to the court be-

cause the United States Attorney was reluctant to return copies of what might be contraband or to aid and abet in the furtherance of some betting enterprise.

The Court: Well, I think that, as I said before, to the extent the defendant needs to examine these for the purposes of preparing a defense he is entitled to have them. Insofar as the return of any of this material is concerned or his right to make copies from it, such a decision will be determined after the outcome of the case. I will know more about it.

Mr. Farber: Thank you very muct, your Honor.

Mr. Marks: Thank you.

The Court: If there is no crime here I am going to have a hard time justifying holding anything.

Mr. Marks: The defendant is ready to plead, your Honor.

The Clerk: Has it been scheduled for that purpose?

Mr. Marks: Yes, it was scheduled for this purpose.

The Court: Yes.

The Clerk: There hasn't been an arraignment or a plea.

137 Mr. Marks: I believe there was an arraignment.

The Court: Just a plea.

The Clerk: Charles Katz is your full true name?

The Defendant: Yes.

The Clerk: And, of course, you have counsel with you here at this podium.

Are you ready now to enter a plea to the Indictment?

Mr. Marks: We are ready.

The Clerk: Do you wish to hear the Indictment read in open court?

Mr. Marks: Waive reading of the Indictment.

Defendant's Plea

The Clerk: Charles Katz, how do you plead to the offense charged in Count 1 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 2 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 3 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 4 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 5 of the Indictment?

The Defendant: Not guilty.

138 The Clerk: Count 6 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 7 of the Indictment?

The Defendant: Not guilty.

The Clerk: Count 8 of the Indictment?

The Defendant: Not guilty.

The Court: How long do you suspect this case will take?

Mr. Marks: I would estimate that it would be a day's trial propably by court, your Honor.

Mr. Farber: If it is the court, your Honor, I would say a day and a half.

The Court: Is a jury to be waived?

Mr. Marks: That is our intention. I wouldn't do it until the date, but as far as I know at this time, your Honor, we are contemplating a court trial.

Mr. Farber: If the defendant would waive jury we would have no objection.

The Court: What about the week of May 3rd?

Mr. Marks: I was going to request of the Court the week of May 17th.

The Court: Any objection?

Mr. Farber: No objection to that date, your Honor.

The Court: Very well. We will set it for the week

139 of May 17th.

The Clerk: In other words, we are going to set it for a jury trial as of now?

Mr. Marks: With the expectation that it will go court.

Mr. Farber: May we request, counsel, though, that if there is going to be a waiver that it be a few days in advance?

Mr. Marks: I will inform the Government and the court, your Honor.

The Clerk: The jury clerk is the one that will be interested.

The Court: If there is going to be a waiver will you notify counsel for the Government and the Court not later than one week prior to trial?

Mr. Marks: Satisfactory.

Mr. Farber: Thank you, your Honor.

Mr. Marks: Time and place?

The Court: It will be set on Judge Carr's calendar, master calendar to be called on May 17th at 9:30.

Mr. Farber: May the exhibits be returned to the Government at this time or should they be kept in the possession of the court?

The Court: Well, why should the court have
140 them?

Mr. Farber: Well, only for the purpose in case there is an appeal there might be some question about the items that were suppressed.

I will say to the court that by and large the same items will be used in evidence.

Mr. Marks: I see no objection to leaving them with the court marked as the exhibits they are. They will probably be in the same order.

Mr. Farber: It is within the discretion of the court.

The Court: Very well. They may be deposited in court.

(Hearing adjourned.)

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141 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

(Title omitted)

No. 34715 Criminal

Minutes of the Court—April 13, 1965

At: Los Angeles, Calif.

Present: Hon. Jesse W. Curtis, District Judge, Deputy Clerk: N. E. Brockman, Reporter: Jack Ellis, U.S. Atty, by Assistant U.S. Atty: Ben Farber, Defendant on bond, Counsel: Burton Marks

Proceedings: Hearing: Court's ruling on defendant's motion to suppress evidence:

Court makes ruling: Defendant's motion to suppress certain telephonic conversations is denied.

Defendant's motion to suppress Items taken at time of arrest is granted in part and denied in part.

Defendant pleas Not Guilty as to all 8 Counts.

Court orders case set for an estimated 1½ days Jury trial on May 17, 1965, 9:30 A.M. (possible Waiver of Jury.)

(File endorsement omitted)

142 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 3471-Criminal

Commissioner's Docket No. 42 Case No. 129

(Title omitted)

Motion to Dismiss Indictment (Rule 12, Federal Rules of Criminal Procedure)—Filed May 7, 1965

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE UNITED STATES OF AMERICA AND ITS ATTORNEYS:

Defendant CHARLES KATZ, by and through his attorney, hereby moves the court to dismiss the within indictment on the grounds that this court is without jurisdiction to proceed in that the statute upon which the indictment is based (18 U.S.C. 1084) is unconstitutional in violation of § 2 of Article 4 and Amendments One and Five of the United States Constitution.

This motion will be based upon all of the files and records of this case; upon the points and authorities submitted herewith and upon such further argument and points and authorities as shall be submitted to the court at the time designated for the hearing of this motion.

DATED: May 7, 1965.

/S/ BURTON MARKS

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143 **Points and Authorities in Support of Motion to Dismiss Indictment**

Section 1084 and § 1952 of Title 18 have been held to be at the very least ambiguous as to what situations they apply. See *U.S. vs. Bergland,* C.A. Wis. 1963, 318 F. 2d 159, cert. denied, 84 S. Ct. 129, 375 U.S 861, 11 Law Ed. 2d 88. The earlier *Bergland* decision (209 F. Supp. 547, reversed on other grounds) held that a strict construction must be placed upon the meaning of said statutes.

The criminal statute which fails to define the crime with sufficient certainty violates the constitutional guarantee of due process of law. This "void for vagueness" doctrine was stated in the leading case of *Conally vs. General Const. Co.* (1926), 269 U.S. 385, 46 S. Ct. 126, 127, 70 Law Ed. 322 as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

Thus in the instant case, the statute provides in the first place that only those "engaged in the business of betting or wagering" are prohibited from doing certain acts. This phrase in itself has no defined meaning and a person doing any one of the prohibited acts would have to guess whether or not he might come within the purview of § 1084.

144 Furthermore, unlike the "bookmaking" statute, Congress has provided no excise tax on one engaged in the business of betting or wagering and is thereby placing impermissible sanctions on a business which may or may not be lawful in an individual state.

Secondly, assuming a person is in the business of betting or wagering, he would be guilty of violation of § 1084 if he transmitted through interstate commerce "information assisting in the placing of bets or wagers on any sporting event or contest." Theoretically then, any person in the business of betting or wagering, who otherwise meets the conditions of the statute, would be subject to imprisonment for two years and a fine of $10,000.00 if he were to indicate in an interstate telephone conversation that the weather in California was "bright and sunny" where the recipient of this information used this information for the purpose of

determining what horse to bet who was running at a track in California.

It is further submitted that Congress has set up an unreasonable classification in exempting from the purview of the statute the transmission of the same information for use in news media or for the use of persons living in states where betting is legal to another person in another state where betting is also legal. Article 4, § 2 of the Constitution provides that:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

It is submitted that Congress cannot deviate from this mandate. Furthermore, it is submitted that it cannot be successfully argued that Congress can use the statute to implement state laws where betting is a crime. This is a matter which should be left to the criminal state prosecutions. See *Parr vs. U.S.*, 363 U.S. 370, 4 Law Ed. 2d 1277, 80 S. Ct. 1171.

145 Equally important is the proposition that the statute infringes and impedes upon the right to free speech and penalizes otherwise harmless conversation and transmission of information if the person putting forth the information is "engaged in the business of betting or wagering" whatever that means.

Whereas statutes are ordinarily presumed to be valid when a law appears to encroach upon a civil liberty or a civil right—particularly First Amendment protection such as freedom of speech, press, assembly, etc., there is a presumption that the law is invalid. See *Thomas vs. Collins,* 323 U.S. 516, 89 Law Ed. 430, 65 S. Ct. 315; *United States vs. Carolene Products Co.,* 304 U.S. 144, 82 Law Ed. 1234, 58 S. Ct. 778; *West Virginia State Board of Education vs. Barnette,* 319 U.S. 624, 87 Law Ed. 1628, 63 S. Ct. 1178, 147 ALR 674.

> ". . . It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. See Hannegan vs. Esquire, Inc., 327 U.S. 146, 156, 90 Law Ed. 586, 592, 66 S. Ct.

456 . . .'' *Speiser vs. Randall,* 357 U.S. 513, 2 Law Ed. 2d 1460, 78 S. Ct. 1332.

Respectfully submitted,

/s/ BURTON MARKS

146 (Acknowledgment of service omitted in printing)

(Filed endorsement omitted)

147 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715-CD (CHC)

(Title omitted)

Opposition to Defendant's Motion to Dismiss Indictment—Filed May 14, 1965

The United States of America opposes defendant CHARLES KATZ's Motion to Dismiss Indictment in the above entitled case because, contrary to defendant KATZ's assertion, Title 18, United States Code, Section 1084, is not unconstitutional.

This Opposition is based on all of the records filed with the Court in the above entitled case and the attached Memorandum of Points and Authorities.

Respectfully submitted,

MANUEL L. REAL
United States Attorney

JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division

BENJAMIN S. FARBER
Assistant United States Attorney

/s/ BENJAMIN S. FARBER
Attorneys for
United States of America

A. *Title 18, United States Code, Section 1084, does not violate the Fifth Amendment by being vague and uncertain.*

In *Turf Center, Inc.* v. *United States,* 325 F. 2d 793 (9 Cir. 1963), it was contended that Title 18, United States Code, Section 1952, a companion section to Section 1084, was unconstitutionally vague. In answer the Court enunciated the applicable test at p. 795:

> "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense. . . ."

Under this test, it would appear that Section 1084 is not vague, but defendant expresses some concern with the term "engaged in the business of betting or wagering". We do not perceive the problem. Certainly "business" is a word of common usage (see *Kahn* v. *United States,* 251 F. 2d 160 (9th Cir. 1958)). There seems to be common understanding among people with respect to the meaning of "wagering" or betting".

United States v. *Bergland,* 318 F. 2d 159 (7th Cir. 1963), is inapposite. The question presented in that case was solely: Is a "past posting" scheme *"any business enterprise involving gambling"* (the italicized language pertains to Section 1952, not to Section 1084), and the court merely said that there was no clear answer without resort to legislative history of the statute.

With respect to defendant's hypothetical, if Section 1084 were construed to cover the example presented, then it might be unconstitutional as applied—since in a felony prosecution of this sort, there is still the requirement
149 of *specific intent.* Intent is not present in the hypothetical.

B. *The enactment of Title 18, United States Code, Section 1084, does not violate Article 4, Section 2, of the United States Constitution.*

Contrary to defendant's assertion, Article 4, Section 2, of the United States Constitution, does not apply to the enactment of Section 1084, Title 18, United States Code. It has been held by the Supreme Court that Article 4, Section 2, of the United States Constitution, was enacted to prevent one state from discriminating against citizens of another, based solely on citizenship in the sister state.

> *New York* v. *O'Neill,* 395 U.S. 1, 6 (1958); *Toomer* v. *Witsell,* 334 U.S. 385-395 (1948); *Hague* v. *C.I.O.,* 307 U.S. 496, 511 (1938), Opinion of Justice Roberts.

C. *Title 18, United States Code, Section 1084, does not violate the First Amendment to the United States Constitution by infringing on freedom of speech.*

Defendant claims that Section 1084 restricts freedom of speech. Yet he doesn't demonstrate how. Most words as such are harmless unless framed in a sinister context. If an actor says, "This is a holdup" in the course of a play, clearly that is a harmless statement. Yet that same language is rightfully penalized if spoken by an individual during the course of a robbery. It can't logically be contended that the latter is an infringement on the right to free speech.

In *United States* v. *Smith,* 209 F. Supp. 907 (E.D. Ill. 1962), the same contention was made; and rejected by the Court at page 918:

150 "The assertion that the statutes are unconstitutional as a restriction on freedom of speech is without merit. While the First Amendment provides freedom of speech, it does not guarantee or protect criminal conduct. There is no conflict between the statutes here involved and the guarantee of the First Amendment. These statutes do not restrict freedom of speech; they merely prohibit the use of interstate facilities to certain conduct which the Congress has declared to be illegal."

For all the above reasons, we respectfully submit that defendant KATZ's motion should be denied.

151 **Certificate of Service by Mail**

(Omitted in printing)

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152 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 17, 1965

At: Los Angeles, Calif.

PRESENT: Hon. CHARLES H. CARR, District Judge, Deputy Clerk: L. B. Figg, Reporter: Kay Wight, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: HEARING motion of defendant, filed May 7, 1965, to dismiss the indictment for lack of jurisdiction in that the statute is unconstitutional;

JURY TRIAL (2 Days)

Defendant and government waive jury and written waiver is signed, approved by the court and filed.

Court orders case continued to 9:30 A.M., May 18, 1965, on request of defendant.

153 IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 18, 1965

At: Los Angeles, Calif.

PRESENT: Hon. CHARLES H. CARR, District Judge, Deputy Clerk: L. B. Figg, Reporter: Kay Wight, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: HEARING motion of defendant, filed May 7, 1965, to dismiss the indictment for lack of jurisdiction on the ground that the statute is unconstitutional;

TRIAL (jury waiver approved & filed 5-17-65)

It is ordered that this case is assigned to Judge Curtis for all further proceedings.

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154 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 19, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge, Deputy Clerk: N. E. Brockman, Reporter: Jack Ellis, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: HEARING: deft's mot to dismiss Indictment:

COURT TRIAL:

11:17 A.M. Court convenes. Attorney for defendant makes his arguments to the Court re motion to dismiss

Indictment. Attorney for Government makes argument in opposition to motion to dismiss. Court denies defendant's motion to dismiss and to suppress. Manuel Jacobs is called, sworn and testifies for Government out of order, and takes the 5th amendment. John R. Barry is called, sworn and testifies for Government. Government's exhibits 1 through 18 are marked and exhibits 1, 2, 4, and 5 heretofore marked are admitted.

12:00 noon Court in recess and reconvenes at 1:54 P.M. John R. Barry, heretofore sworn resumes testifying. Emmett B. Doherty is called, sworn and testifies for Government. Government's exhibits 3, 6 and 8 heretofore marked are admitted. Judith Cunningham is called, sworn and testifies for Government. Government exhibits 7-A thru 7-K heretofore marked are admitted.

2:45 P.M. Court in recess and reconvenes at 3.02 P.M. Judith Cunningham, heretofore sworn is called, sworn and testifies further. Allen F. Frei is called, sworn and testifies for Government. Government's exhibit 19 is marked and admitted in evidence. Leo V. LaRue is called, sworn and testifies for Government. Government's exhibits 9 through 17 heretofore marked are admitted in evidence and exhibit 20 is marked for identification. Timothy L. Donovan is called, sworn and testifies for Government. Government's exhibit 21 is marked and admitted in evidence. Joseph A. Gunn is called, sworn and testifies for Government. Government's exhibit 18 heretofore marked is admitted in evidence.

Court orders Court trial continued to May 20, 1965, 1:30 P.M.

155 IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

No. 34715 Criminal

(Title omitted)

Minutes of the Court—May 20, 1965

At: Los Angeles, Calif.

PRESENT: Hon. JESSE W. CURTIS, District Judge, Deputy Clerk: N. E. Brockman, Reporter: Jack Ellis, U.S. Atty, by Assistant U.S. Atty: Benjamin S. Farber, Defendant: on bond, Counsel: Burton Marks

PROCEEDINGS: FURTHER COURT TRIAL:

1:49 P.M. Court convenes 2nd day of Court trial. Joseph A. Gunn heretofore sworn resumes testifying. Government rests its case.

2:35 P.M. Court in recess and reconvenes at 2:53 P.M. Attorney for defendant makes motion to strike Government's exhibits 1 thru 6 and the test between defendant and the F.B.I. Agents, and the Court denies said motion. Defendant rests its case.

Attorney for Government makes opening arguments to the Court. Attorney for defendant makes argument to the Court. Attorney for Government makes closing arguments to the Court.

Court finds the defendant Guilty to all 8 Counts as charged.

IT IS ORDERED that the defendant is referred to the Probation Officer for investigation and report and the case is continued to June 21, 1965, 2:00 P.M., for sentence.

Court orders defendant remain on bond.

3:30 P.M. Court adjourns.

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158 **Transcript of Hearing on Motion to Dismiss**

Los Angeles, California, Wednesday, May 19, 1965. 9:30 A.M.

(Other matters heard.)

The Court: You may proceed in the Katz matter.

Mr. Farber: Thank you, your Honor.

Your Honor, may I lodge with the clerk exhibits which have been premarked Government's Exhibits 1 through 18? May they be marked for identification only?

Mr. Marks: Well, your Honor, I believe the Government may be a little bit premature. He may never have to lodge them, depending on the court's ruling on a motion that is pending.

The Court: Well, that is true. But they may be lodged.

The first thing to be considered by the court is a motion to dismiss.

Defendant's Motion to Dismiss and Defendant's Renewed Motion to Suppress Evidence

Mr. Marks: Yes, your Honor.

For the record I would like to state that I am also renewing the motion to suppress which the court has already heard.

The basis of the motion to dismiss, your Honor, is on the grounds that the statute under which the defendant is charged is unconstitutional either as applied or as it might be applied or on its face in that not only is it vague and ambiguous, but also the construction of
159 the statute is such that it violates the First Amendment protection as to the right of free speech without any showing of a clear and present danger.

It treats persons in similar situations with unequal force. In other words, some persons can make a phone call through interstate commerce. Assuming they are not in the business of wagering, they can make a bet in interstate commerce. Assuming that a person is in the business of betting or wagering, any statement which he makes is ipso facto a crime regardless of the innocent nature of the statement. This is without respect to whether or not the crime is one in the State in which the man is—

The Court: Well, the conversation, I take it, has to pertain to the completing of the bet. He can't inquire about the health of his mother-in-law.

Mr. Marks: But the example I gave in my motion was a person in the business of betting. Assume that fact. He gets on the telephone, talks to a friend in New York. The friend says, "How's the weather out in California?"

He says, "Bright and sunny."

This conversation is overheard through a wire tap or a bug being placed outside the telephone booth. Now, the person is arrested because he has relayed information to the defendant in New York regarding racing; that is, that it is a bright and sunny day.

This aids, as far as I understand, track handicappers immeasurably, or supposed to decide what horse they are going to bet on, whether it is going to be a mudder or a horse that runs better on a dry track.

So the type of information that can be given is of such a trivial nature that it can subject a person to a criminal offense.

I believe the authorities that I have cited, the Speiser case, deal with the rights of free speech.

I think that it has been firmly established now that the only time that Congress with the consent of the Senate or any State can pass a law abridging the rights of free speech directly or indirectly is where they can show that clear and present danger exists.

Now, the presumption that the Government takes is that it is a crime, that what Congress has done is to legislate against a crime. But that is not the fact. That is not what Congress has legislated against, because they have legislated against a person being in a particular business without respect to whether or not that business is legal or illegal.

They have not specially taxed the business like they have taxed the bookmaking business. I assume that if a person is in the business of betting and wagering he pays taxes on his bets just like anybody else. He can be, as a matter of fact, a handicapper, a professional handicapper who does nothing but go to the track and make his living by betting the track and having some skill and knowledge in the running of horses.

If that is his business and he uses the telephone for some information regarding the track—which is legal to bet—he is still guilty of a felony regardless.

Again I say the fact of giving betting information or wagering information is not in and of itself a crime, because Congress has specifically exempted from the purview of the statute news media which constantly transmit betting information, transmit odds on games back and forth across state lines over all these telephones.

What Congress has done, I believe, is placed an impermissible sanction upon the use of the telephone and the right to speak freely without any relation to the fact of whether or not the person engaged in the business is engaged in a criminal business or non-criminal business.

What they have done in effect, therefore, is deny the right of free speech by indirect prohibition and in some cases by direct prohibition. They have deprived the person of a property right without the process of law. In other words, the right to be in a business not in itself unlawful. I am speaking about the horse racing business. Because the States do countenance it. They make an exception if you place information from a State. I am talking about a bettor now only in that case where the wagering is lawful in one State to another State where the wagering is lawful, tnd ahe question is what is betting or wagering.

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Now, if a person in California calls a person in New York about a race track, about track information, and wagering on a track is lawful, I still believe that under the purview of the statute he could be convicted.

And because of the statute's unequal application, because of the statute's vagueness, I still don't know what "in the business of betting or wagering means." Perhaps the Government does, it being omnipotent in that sense. But I don't think that those words have any commonly-defined meaning.

Well, I don't what "in the business of betting or wagering" means. I don't know and I don't think the court can say what is meant by transmitting of any information concerning betting across state lines. There is nothing about "in the business". There is a denial of equal protection.

163 Usually we talk about equal protection in the Fourteenth Amendment sense. But my understanding is that the due process clause of the Fifth Amendment related to the Federal Government also has this primary concept to it that you can't specially legislate. And each citizen is entitled to equal protection of the law and to be treated equally.

Here a person who may be doing something lawfully is denied the right to use a telephone across interstate lines to do the same thing that someone who is not in the business is entitled to do.

I believe the Indictment should be dismissed on that basis alone.

Mr. Farber: Your Honor, it is respectfully submitted that a court does not consider a question such as presented in this case in the abstract, especially when considering the constitutionality of a statute.

I think it is also well established that one branch of the Government such as the Judiciary does not lightly declare unconstitutional the enactments of the other branch of the Government, the Legislature.

Now, with respect to the question in this case, is this statute so vague that it is unconstitutional, of course if there is any construction which would make the statute con-
164 stitutional, of course the courts would obviously favor such a construction and such a construing so as not to overrule an enactment of the Legislature.

Now, in this very Circuit, in a fairly recent case which is cited in our memo, Turf Center, Inc. v. United States, this Circuit was considering whether or not Title 18, United States Code, Section 1952, was unconstitutional as being void for vagueness.

Now, Section 1952 is important because it is actually a companion enactment to the section under question.

In that case the court said that a statute means the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to prescribed conduct when measured—and this is really the important language—by common understanding and practices.

So I think the words "engaged in the business of betting or wagering" when judged by common understanding and practice does have a definite meaning.