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The Constitutionality of Electronic Eavesdropping

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THE CONSTITUTIONALITY OF ELECTRONIC EAVESDROPPING

I. Introduction

The right to privacy, or the right to be let alone, has been jealously guarded as the most fundamental of individual rights since the formulation of the Bill of Rights.[1] It is said to be at the very core of the fourth amendment[2] and found within the penumbra of the first, third, fourth, fifth, sixth and ninth amendments.[3] Electronic eavesdropping poses a serious threat to individual privacy. It has challenged the Constitution to provide adequate safeguards for protecting the precious right to privacy.

The use of informers "rigged for sound" is not discussed in this note. On this subject the United States Supreme Court recently held that the use of informers is not per se unconstitutional,[4] and the fact that an informer has hidden on his person a recorder[5] or a transmitter[6] has not been considered to involve the more serious considerations of privacy that are involved in secret electronic eavesdropping.

II. Existing Law Governing Electronic Eavesdropping

A. Eavesdropping Without Authorization: The Fourth Amendment Standard

Through the years, the fourth amendment has protected individual privacy against arbitrary police invasion by prohibiting searches and seizures made pursuant to an unauthorized entry

1. See Stanford v. Texas, 379 U.S. 477, 480 (1965).

> [The Founding Fathers] sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, *every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.* (Emphasis added.)

Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion); Boyd v. United States, 116 U.S. 616, 622 (1885).

2. Boyd v. United States, 116 U.S. 616, 622 (1885).
3. Griswold v. Connecticut, 381 U.S. 479, 480-507 (1965).
4. Hoffa v. United States, 87 Sup. Ct. 408, 418 (1966).
5. Lopez v. United States, 373 U.S. 427 (1963).
6. On Lee v. United States, 343 U.S. 747 (1952).

or trespass.[7] With the advent of electronic eavesdropping, however, came a means of invading privacy without requiring a physical invasion, thereby circumventing the traditional fourth amendment "trespass" standard.[8]

The Supreme Court has, nevertheless, considered electronic eavesdropping within the purview of the fourth amendment, finding it unconstitutional when it results in an "unauthorized intrusion into a constitutionally protected area."[9] Where a listening device is held against an adjoining wall to overhear and record conversations in the next room, there is no "unauthorized intrusion," and therefore such eavesdropping is constitutional.[10] On the other hand, if the listening device pierces the adjoining wall a fraction of an inch, there is an "unauthorized intrusion," and the eavesdropping is unconstitutional.[11] The invasion of privacy in both cases is the same, the only distinction being the superficial physical penetration.

The inadequacy of the "trespass" standard in determining the constitutionality of electronic eavesdropping seems obvious, but this standard represents the existing law governing electronic eavesdropping. The inadequacies of the fourth amendment standard and a suggested constitutional standard which would offer more adequate protection against the use of electronic eavesdropping are discussed in section III of this note.

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7. Stanford v. Texas, 379 U.S. 477, 480 (1965).

8. Laser beams and extra-sensitive directional microphones enable the modern eavesdropper secretly to overhear and record conversations within a private room while stationed some distance away. More examples of advanced electronic eavesdropping equipment are set out in section III of this Note, *infra.* See Time, Dec. 16, 1966, p. 76; "Someone Knows All About You", Esquire, May, 1966, pp. 98-101; *Hearings Before the Sub-Committee on Administrative Practice and Procedure of the Senate Judiciary Committee,* 89th Cong., 1st Sess., S. Res. 39, at 28, 29, 45-55, 321-325 (1965); PACKARD, THE NAKED SOCIETY 37-38 (1964); DASH, THE EAVESDROPPERS 350, 353, 357-358 (1959).

9. Silverman v. United States, 379 U.S. 477, 480 (1965) Annot., 97 A.L.R.2d 1283 (1964). *Compare* Clinton v. Virginia, 377 U.S. 158 (1964) (a penetration in an adjoining wall the depth of a thumbtack was considered a trespass and thus in violation of the fourth amendment) *with* Goldman v. United States, 316 U.S. 129, 134-135 (1940) (placing a detectaphone against an adjoining wall was not a trespass and thus did not violate the fourth amendment); Katz v. United States, 369 F.2d 130 (9th Cir. 1966) (a microphone attached to the outside of a phone booth was not a violation of the fourth amendment). For a discussion of what areas are constitutionally protected, see Lanza v. New York, 370 U.S. 139 (1962); See also, United States v. Baxter, 89 F. Supp. 732 (E.D. Tenn. 1952).

10. Goldman v. United States, 316 U.S. 129, 134-135 (1940); Katz v. United States, 369 F.2d 130 (9th Cir. 1966).

11. Clinton v. Virginia, 377 U.S. 158 (1964). *Accord,* Silverman v. United States, 365 U.S. 505, 510 (1961).

B. *Court-Authorized Electronic Eavesdropping*

1. *As a Violation of the Fourth Amendment.* In an attempt to control electronic eavesdropping some states have enacted statutes which allow police limited use of electronic eavesdropping equipment where such use is authorized by court order.[12] The court order must have the effect of a search warrant if it is to legalize an electronic "search and seizure."[13]

It is doubtful, however, that a court order authorizing electronic eavesdropping can comply with the "warrant clause"[14] of the fourth amendment. The provision of the warrant clause which seems to defy compliance is the requirement that a search warrant must particularly describe "the things to be seized." A specific description of conversation to be "seized" in the future is impossible since the words have not yet come into existence. To further complicate matters, electronic eavesdropping is necessarily indiscriminate. No listening device has yet been discovered which shuts itself off to social discourse and turns itself on when the conversation turns to crime.[15] Due to the nature of electronic eavesdropping, it seems apparent that a court order cannot meet the particularization requirement of the warrant clause, and therefore cannot have the effect of a valid search warrant. And, if the court order is not equivalent to a search warrant, it cannot authorize a search and seizure.[16]

Even if the court order were construed to be a valid warrant, the prohibition against seizing mere evidence and the notice requirement would seem to render court-ordered electronic eavesdropping an unreasonable search and seizure in violation of the fourth amendment.

12. Massachusetts, Maryland, Nevada, New York, and Oregon are among those states which allow court-ordered electronic eavesdropping.

13. See People v. Grossman, 257 N.Y.S. 2d 266, 275-286 (Sup. Ct. 1965); 66 COLUM. L. REV. 355 (1965).

14. "[No] warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV.

15. The unpleasant fact is that the snooper, even when he operates under the most carefully drawn court orders for the most virtuous public purpose, cannot screen out any of the conversation—relevant or irrelevant—that the insatiable ear of his monitoring devise picks up. In that sense, once the right to "bug" is granted, no practical limit may be put on its exercise.
N.Y. Times, Nov. 28, 1966, § L, p. 38.

16. Where a search warrant fails to particularize the "things to be seized" it is a general warrant, and a search pursuant to such a warrant is a general search in violation of the fourth amendment. Stanford v. Texas, 379 U.S. 477, 481 (1965).

In determining the reasonableness of a search and seizure, the Supreme Court has often condemned the seizure of mere evidence as a violation of the fourth amendment,[17] emphasizing the distinction between merely evidentiary materials, which may not be seized under the authority of a search warrant or incident to a lawful arrest, and those items which may be validly seized.[18] The only things that may be the subject of a lawful seizure are fruits of the crime,[19] contraband,[20] and instruments of the crime.[21] The basis for this distinction is found in the landmark case of *Entick v. Carrington*[22] which stated that "the law obligeth no man to accuse himself . . . and a search for mere evidence is disallowed on the same principle."[23] A search warrant cannot remove the barrier set up to protect the right of privacy and private ownership. This barrier can be removed only to permit the recapture of illegally obtained property or to permit the seizure of property which has been forfeited because it was used as an instrument of crime. The prohibition against the seizure of "mere evidence" is so fundamental that it is applied to the states through the fourteenth amendment.[24]

It follows that a court order cannot authorize a search for "mere evidence" since such a search is unreasonable and in violation of the fourth amendment.[25] It is difficult to conceive of conversations which could be classified as fruits of a crime, contraband, or instruments of a crime, so that most, if not all, conversations fall in the category of "mere evidence." If conversations are no more than "mere evidence," to overhear and record them would constitute an unreasonable search and seizure in violation of the fourth amendment, even where a court order purports to authorize such eavesdropping.[26]

Traditionally, notice has been a requirement of reasonable searches and seizures.[27] It is obvious that expediency requires

17. Harris v. United States, 331 U.S. 145, 154 (1947); United States v. Lefkowitz, 285 U.S. 452 (1931); Gouled v. United States, 255 U.S. 298 (1921).
18. *Ibid.*
19. Boyd v. United States, 116 U.S. 616, 622 (1885).
20. Harris v. United States, 331 U.S. 145, 155 (1947).
21. Abel v. United States, 362 U.S. 217, 238 (1960).
22. 19 HOWELL, STATE TRIALS 1029 (1765).
23. *Id.* at 1073.
24. Aguilar v. Texas, 378 U.S. 108, 110 (1964).
25. Stanford v. Texas, 379 U.S. 477, 480 (1965).
26. See People v. Grossman, 257 N.Y.S. 2d 266, 278-284 (Sup. Ct. 1965).
27. Our American common law recognizes the requirement of notice. See McCaslin v. McCord, 116 Tenn. 690, 708, 94 S.W. 79, 83 (1906); Barnard

that no notice be given to parties whose conversations are to be secretly overheard and recorded. Police inconvenience, however, is not justification for disregarding constitutional requirements, so that lack of notice might well determine court-ordered electronic eavesdropping to be an unreasonable search and seizure, in violation of the fourth amendment.[28]

Court-authorized electronic eavesdropping seems inherently violative of the fourth amendment. The requirement to particularize "the things to be seized," the prohibition against seizing "mere evidence" of crime, and the requirement of notice all operate as constitutional barriers to court-authorized electronic eavesdropping. And with no authorization, eavesdropping accomplished by an intrusion into a constitutionally protected area is clearly a violation of the fourth amendment.[29] If the constitutionality of electronic eavesdropping is to be determined by the existing standards of the fourth amendment, electronic eavesdropping seems inherently unconstitutional.[30]

2. *As a Violation of the Fifth Amendment.* If court-authorized electronic eavesdropping is found to violate the fourth amendment, then it violates the fifth amendment as well. The Supreme Court has traditionally recognized the intimate relationship between the fourth amendment prohibition against unreasonable searches and seizures and the privilege against self-incrimination of the fifth amendment.[31] Thus the fifth amendment becomes another constitutional obstacle to court-authorized electronic eavesdropping.

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v. Bartlett, 64 Mass. 501, 502 (1852); State v. Smith, 1 N.H. 346 (1818). The protections of indivdiual freedom incorporated into the fourth amendment include the firmly established common law requirement that police announce their presence before entering pursuant to a search warrant. Boyd v. United States, 116 U.S. 616 (1885). There are exceptions to the notice requirement. See generally Ker v. California, 374 U.S. 23 (1963) (notice not required where suspect could have easily destroyed unlawful drugs); Read v. Case, 4 Conn. 166 (1822) (notice not required where the police are in peril of bodily injury).

28. See generally Hoese, "Electronic Eavesdropping," 52 CALIF. L. REV. 142, 153 (1964).

29. Clinton v. Virginia, 377 U.S. 158 (1964); Silverman v. United States, 379 U.S. 477, 480 (1961).

30. It has been suggested that the fourth amendment will allow police restricted use of electronic eavesdropping, but it is conceded that new standards must be formulated to apply the fourth amendment to electronic eavesdropping. See 50 MINN. L. REV. 378, 408 (1966).

31. Stanford v. Texas, 379 U.S. 476, 485 (1965); Boyd v. United States, 116 U.S. 616, 633 (1885). The unreasonable searches and seizures condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in a criminal case is condemned in the fifth amendment. 379 U.S. 476, 485.

3. *As a Violation of the First Amendment.* Court order statutes may be held unconstitutional on their face as prior restraints on the freedom of speech. It is well established that any statute operating as a prior restraint on the freedom of expression, assembly or press is unconstitutional.[32]

The Supreme Court has recognized the vital relationship between privacy and the "preferred rights" of the first amendment. Where there is no privacy, there can be no freedom of expression.[33] Mr. Justice Brennan recognized that the freedom of expression is undermined when people fear to speak unconstrainedly in what they suppose to be the privacy of their home or office.[34] Knowledge that police are allowed by statute to utilize electronic eavesdropping equipment to secretly invade the privacy of constitutionally protected areas most certainly promotes apprehension in the minds of the public. This public apprehension operates as a prior restraint on the freedom of expression since no one can be certain that his conversations are not being secretly overheard and recorded by the police.

We need not speculate as to the effect of authorized electronic eavesdropping on the freedom of speech. Over two decades ago in Nazi Germany members of families were forced to gather in bathrooms to conduct whispered discussions of intimate affairs if they were to escape the omnipresent ear of the secret police.[35] The title of Vance Packard's *The Naked Society*[36] indicates the effect that electronic eavesdropping devices have on a free society. George Orwell goes even further in his novel, *1984*,[37] in which he paints a picture of an entire race being subverted to a ruthless god-head, Big Brother, by means of advanced electronic eavesdropping equipment. Senator Edward V. Long (D. Missouri) chided public apathy toward electronic eavesdropping and warned:

> Privacy is necessary to the development of a free and independent people. To preserve this privacy, our national lethargy and lack of knowledge must be countered. Unless

32. Saia v. New York, 334 U.S. 558, 561 (1948); Near v. Minnesota, 283 U.S. 694, 723 (1931).

33. Griswold v. Connecticutt, 381 U.S. 479, 483 (1965); NAACP v. Alabama, 357 U.S. 449, 462 (1958).

34. Lopez v. United States, 373 U.S. 427, 470 (1963) (dissenting opinion).

35. United States v. On Lee, 193 F. 2d 306, 317 (2d Cir. 1952) (dissenting opinion).

36. See PACKARD, THE NAKED SOCIETY (1964).

37. See ORWELL, 1984 (1949).

> we preserve our right to privacy, we will be threatened with a long downhill slide into a state of conformity and dependence upon Big Brother. Encroachments on freedom begin on a small, insidious scale. Let us take heed now.[38]

In summary, court order statutes and the electronic eavesdropping they authorize are in violation of the first, fourth, and fifth amendments. It is difficult to imagine any police activity more fraught with constitutional violations than electronic eavesdropping, and court authorization does not affect its inherent unconstitutionality.[39]

III. ELECTRONIC EAVESDROPPING AND THE RIGHT TO PRIVACY

A. The Inadequacy of the Fourth Amendment Standard

Modern technology has provided police with devices which may overhear and record conversations occurring within the most private confines without necessitating a physical entry. A radar microphone disguised as an auto spotlight can monitor a conversation taking place in a closed office blocks away by picking up the vibrations on a window pane. Long-range "mikes" mounted on tripods and aimed like guns are available. Parabolic microphones may be utilized to amplify millions of times those sound waves produced in a distant conversation. Portable laser "mikes" emit an invisible infrared beam no larger than a pencil which may enter the home or office through a closed window. The beam is then reflected back and the conversation decoded. These represent only a few of the devices now available to the police.[40]

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38. See Long, "You Ought to Be Let Alone," Esquire, May, 1966, p. 103.

39. The one thing that emerges with any clarity from the flak currently enveloping Robert F. Kennedy and J. Edgar Hoover is the apparent impossibility of putting effective restraints on invasions of privacy by electronic snoopers.

> The Kennedy-Hoover exchange merely underscores the difficulties involved in trying to establish practical limits on eavesdropping, even when performed solely by law-enforcement agencies in the interest of national security or crime control. The minimum requirement before any tap is established ought to be an order signed by a judge, but it becomes increasingly evident that watching the watchdogs can be as vexing a problem as what they watch.

N.Y. Times, Dec. 13, 1966, § L, p. 46.

40. See Time, Dec. 16, 1966, p. 76; "Someone Knows All About You", Esquire, May, 1966, pp. 98-101; *Hearings Before the Sub-Committee on Administrative Practice and Procedure of the Senate Judiciary Committee,* 89th Cong., 1st Sess., S. Res. 39, at 28, 29, 45-55, 321-325 (1965); PACKARD, THE NAKED SOCIETY 37-38 (1964); DASH, THE EAVESDROPPERS 350, 353, 357-358 (1959).

The fourth amendment prohibition of unreasonable searches and seizures has been the traditional constitutional protection against unreasonable invasions of privacy.[41] The Supreme Court has heretofore utilized the fourth amendment to determine the constitutionality of electronic eavesdropping, finding that electronic eavesdropping resulting in "the reality of an unauthorized actual intrusion" is in violation of the fourth amendment.[42] It seems obvious that such a physical trespass concept is entirely inadequate to protect against invasions of privacy which do not necessarily involve any physical intrusion, as may be accomplished by electronic eavesdropping.[43] Although the fourth amendment trespass concept has provided effective protection against unreasonable *physical* invasions of privacy,[44] it does not afford protection against electronic invasions of privacy; so the Court must look to other standards if there is to be any effective constitutional protection against electronic eavesdropping.

An attempt to reconcile the decisions of the United States Supreme Court dealing with electronic eavesdropping underlines the need to replace the trespass concept. In *Goldman v. United States*[45] police officers entered the suspect's office without a search warrant to plant an electronic listening device. When the device malfunctioned a detectaphone was held against the wall of the adjoining office so that the police could overhear all of the conversations taking place within the suspect's office. The Court concluded that the officers had not committed a trespass in gathering the evidence and upheld its admissibility, although the use of the detectaphone substituted for the trespass committed by the police in their abortive attempt to "bug" the office.[46]

On the other hand, in *Silverman v. United States*,[47] law officers inserted a "spiked mike" into a common wall, transforming the heating system of the accused's home into a gigantic micro-

41. Stanford v. Texas, 379 U.S. 476, 485 (1965); Frank v. Maryland, 359 U.S. 360, 362-366 (1959); Boyd v. United States, 116 U.S. 616, 630 (1885); United States v. Baxter, 89 F. Supp. 732 (1950).

42. Clinton v. Virginia 377 U.S. 158 (1964); Silverman v. United States, 365 U.S. 505, 512 (1961).

43. See Silverman v. United States, 365 U.S. 505, 512-513 (1961) (concurring opinion).

44. Stanford v. Texas, 379 U.S. 476, 480 (1965).

45. 316 U.S. 129 (1942). *Accord,* Katz v. United States, 369 F.2d 130 (9th Cir. 1966).

46. Goldman v. United States, 316 U.S. 129, 135 (1942).

47. 365 U.S. 505 (1961).

phone. In excluding the overheard incriminating conversations, the Court termed the use of the spiked listening device an "unauthorized physical penetration into the premises" which constituted an unreasonable search and seizure. In reaching this result, the Court accorded conversations the same constitutional protections as tangible property.[48]

A more recent Supreme Court case, *Clinton v. Virginia*, cited *Silverman* and held that a device which made the impression of a thumbtack in the wall of an adjoining office constituted a trespass.[49] The invasion of privacy in *Clinton* was the same as in *Goldman*, but the Supreme Court allowed the electronic eavesdropping in *Goldman* since there was no unauthorized physical invasion involved.[50]

Thus, with the sanctity of the home and office hanging in the balance, the Supreme Court has determined the constitutionality of electronic eavesdropping by an entirely inadequate concept. The Supreme Court has thus far declined to recognize the awesome capacity of electronic eavesdropping devices to invade privacy, declaring their use unconstitutional only when they incidentally effect a physical trespass.

B. The Privacy Standard

The emerging "right to privacy" will furnish more adequate standards for determining the constitutionality of electronic eavesdropping. That there is a constitutional right to privacy cannot be doubted. The Supreme Court has repeatedly recognized the right to privacy, or the right to be let alone, a concept which lies at the very core of the fourth and fifth amendments.[51] The most distinguished defenders of the right to privacy, Mr. Justice Holmes and Mr. Justice Brandeis, joined in expressing the belief that the right to be let alone served as the very foundation of the Bill of Rights:

> (The Founding Fathers) sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.[52]

48. *Id.* at 509.
49. Clinton v. Virginia, 377 U.S. 158 (1964).
50. 316 U.S. 129, 134-135 (1942).
51. Stanford v. Texas, 379 U.S. 476, 485 (1965).
52. Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (dissenting opinion).

In his dissent in *On Lee v. United States*,[53] Mr. Justice Douglas revealed that he had been converted by Mr. Justice Brandeis' *Olmstead* dissent, *supra*, and repented of his adherence to the majority opinion in *Goldman v. United States*.[54] He recently reaffirmed his convictions in concurring opinion in *Silverman v. United States*,[55] recognizing that the measure of injury occasioned by the use of electronic eavesdropping devices should not be measured by the depth of physical penetration or even by the remoteness of the device from the place being eavesdropped upon. Rather, he said, the chief consideration should be whether the privacy of the home was invaded.

There is some difference of opinion as to which amendment, or combination of amendments, should serve as the source of the right to privacy, although there is no doubt that privacy is constitutionally protected. Justice Brandeis in his *Olmstead* dissent found a union of the fourth and fifth amendments to be the basis of a comprehensive right to privacy.[56]

In *Griswold v. Connecticut*[57] several theories were advanced as to the source of the right to privacy. Mr. Justice Douglas, writing for the Court, found the right to privacy protected by the "penumbra" of the first, third, fourth, fifth, and ninth amendments, as applied to the states through the fourteenth amendment.[58] Mr. Justice White and Mr. Justice Harlan concurred separately, finding the right to privacy guaranteed by the "due process of law" clause of the fourteenth amendment.[59] Mr. Justice Harlan did not rely on any specific provision of the Bill of Rights, but instead on the "concept of ordered liberty," a standard which permits an occasional look beyond the first eight amendments to find those fundamental rights included within the fourteenth amendment.[60] Mr. Justice Goldberg joined in the opinion of Mr. Justice Douglas and also wrote a separate concurrence, emphasizing the importance of the ninth amendment as evidence that the express provisions of the first eight

53. 343 U.S. 747, 762 (1952) (dissenting opinion).
54. 316 U.S. 129 (1942).
55. 365 U.S. 505, 512-513 (1961) (concurring opinion).
56. Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).
57. 381 U.S. 479 (1965) [noted in 79 HARV. L. REV. 162 (1965)].
58. *Id.* at 479-507.
59. *Id.* at 499-507.
60. *Id.* at 499-502.

amendments do not exhaust the restrictions placed on the states through the fourteenth amendment.[61]

In summary, five Justices in the *Griswold* case relied on the ninth amendment, including the adherents of the "ordered liberty" and "penumbra" views, as a constitutional basis for the right to privacy. Thus, the *Griswold* case leaves no doubt that the Supreme Court recognizes the right to privacy to be a fundamental constitutional right.

A clear violation of the right to privacy occurs when electronic eavesdropping devices are used to overhear and record conversations within a constitutionally protected area. In *Griswold* the constitutionally protected bedroom was afforded protection from police invasion. An office should be afforded similar protection from invasion.[62] Since *Griswold* was concerned with protecting the *privacy* of a constitutionally protected area, its result should not be affected by the means employed to accomplish the invasion. In fact, the use of electronic eavesdropping equipment to effect an invasion of the home or office is more reprehensible than the traditional physical invasion.

In determining whether the police use of electronic eavesdropping equipment violates the right to privacy, the Supreme Court should consider the inherently offensive characteristics of electronic eavesdropping. Police use of such devices must necessarily be shrouded in secrecy; the suspect is without notice of the invasion of his privacy. The indiscriminate nature of the electronic eavesdropping device adds to its offensiveness; it listens to all conversations within the "bugged" premises regardless of the speaker or subject matter. Further, electronic investigations are usually of long-term duration, an important factor in view of the secrecy which must be maintained throughout the eavesdropping operation.

It is by combining an invasion of a constitutionally protected area with the use of inherently offensive electronic eavesdropping equipment that results in an unreasonable invasion of privacy.

The Supreme Court recently ordered a new trial for an appellant so that he might protect himself against any unconstitutionally obtained evidence.[63] This action was taken when it was discovered that electronic eavesdropping had been utilized in

61. *Id.* at 456-499.

62. Lanz v. New York, 370 U.S. 139, 143 (1962); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1919).

63. Black v. United States, 87 Sup. Ct. 190 (1966).

the investigation preceding the appellant's conviction. The action of the Court indicates a strong distaste for electronic eavesdropping, especially since none of the evidence obtained by electronic eavesdropping had been admitted against the appellant.[64] Mr. Justice Harlan, dissenting, stated:

> The only basis I can think of for justifying this decision is that any governmental activity of the kind here in question [electronic eavesdropping] automatically vitiates so as at least to require a new trial any conviction occurring during the span of such activity.[65]

In summary, the use of electronic eavesdropping equipment by police to overhear and record conversations within constitutionally protected areas is an unreasonable invasion of privacy. Therefore, evidence obtained by such unconstitutional means should be inadmissible as a denial of due process.[66]

IV. CONCLUSION

Electronic eavesdropping, even where authorized by court order, seems inherently unconstitutional. Unfortunately, the few Supreme Court cases which have squarely met the issue of electronic eavesdropping determined its constitutionality on the basis of a totally inadequate concept—whether a trespass was accomplished in the "bugging" process. Although a court order construed as a valid warrant might authorize a physical entry, any subsequent electronic eavesdropping would be in violation of the first, fourth, and fifth amendments. More serious, however, is the invasion of the right to privacy which results whenever electronic eavesdropping equipment is used to invade a constitutionally protected area.

If electronic eavesdropping is to be allowed at all, it must be determined whether the individual's interest outweighs the interest of society to be free from such unconstitutional police practices. In balancing these interests it seems that any increased police efficiency which might result from the use of electronic eavesdropping equipment to secretly invade traditionally private places is far outweighed by the constitutional violations involved in such police practice.

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64. *Id.* at 192.
65. *Id.* at 193 (dissenting opinion).
66. Mapp v. Ohio, 367 U.S. 643, 651 (1961).