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Donald R. Bradford

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# NOTES AND COMMENTS

## CONSENT TO ELECTRONIC SURVEILLANCE BY A PARTY TO A CONVERSATION: A DIFFERENT APPROACH

Donald R. Bradford

Under the Omnibus Crime Control and Safe Streets Act of 1968, a law enforcement officer is allowed to intercept wire or oral communication where such officer is a party to the conversation or where one of the parties to the conversation has given prior consent to such interception.<sup>1</sup> Interception, whether by wiretapping, recording from an extension telephone, or by any other means where done with consent of one of the parties is not subject to prior judicial approval, *i.e.*, no warrant is required for such surveillance and interception.

That the foregoing provision of the Act is unconstitutional is the subject of this comment in which three fundamental arguments are presented: (1) When a conversation is intercepted and recorded, much more than the substance of the conversation is taken. Identity of the speaker, personality traits, emotional stress, and truthfulness of the words spoken are just a few of the elements of the recorded voice which may now be analyzed by modern electronic instruments. The "seizure" of these elements of voice is therefore a violation of the speaker's expected area of privacy. (2) The right to privacy and the free flow of different ideas is fundamentally necessary to a democratic society. Allowing electronic surveillance of speech without a warrant is a serious erosion of the very foundation of our social structure. (3)

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1. "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(c) (1970).

Since *U.S. v. Katz*<sup>2</sup> a person's reasonable expectation regarding zones of privacy is the test for determining the extent of fourth amendment search and seizure protection. The idea that a third party may consent to the violation of these protections is foreign to the concept of individual constitutional rights guaranteed by the fourth amendment.

### I. TECHNICAL ELEMENTS OF RECORDED SPEECH

A person speaks for the purpose of communicating an idea, but he may in fact communicate much more than the spoken word if only the listener has the proper electronic means to interpret the speech. Upon proper analysis speech may be made to reveal the identity of the speaker, his personality traits, and his emotional state, as well as his veracity.

The earliest and most notable research in the area of identification by voice analysis was conducted by L.G. Kersta at Bell Laboratories and later at Voiceprint Laboratory, Inc. in the late 1950's and early 1960's.<sup>3</sup> The technique of identifying a person by his voice involves recording the voice and playing it back through a series of electronic instruments which then produce a graphic display of the words spoken. These voicegraphs, usually inscribed on paper, are said to be unique for each individual just as fingerprints are unique. Voicegraphs have been used for years by police investigators and recently have found acceptance by courts as evidence of identification.<sup>4</sup>

Since Kersta's original work in the identification field, research relating to voice analysis has spread to many areas and has lead to several interesting applications. By electronically analyzing speech, researchers have been able to classify a speaker's emotional state as that of sorrow, anger, or fear.<sup>5</sup> Also, personality traits have been observed to be inherent in all speech and can be used to predict a person's susceptibility to heart attacks.<sup>6</sup> This research done at Mt. Zion Hospital and Medical Center in San Francisco has resulted in the prediction of potential heart attack patients in a test group with 75 to 84% accuracy.

With the ability to establish personality and other psychological traits by voice analysis, it was inevitable that researchers in the lie de-

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2. *United States v. Katz*, 389 U.S. 347 (1967).

3. Steinhaver, *Voiceprints*, SAT. REVIEW, Sept. 9, 1969, at 56.

4. Vaughn, *New Trends In Admissibility of Polygraph Tests and Spectrogram Voiceprint Identification Evidence*, 2 MEMPHIS STATE U.L. REV. 282 (1973).

5. Williams and Stevens, *Emotions and Speech; Some Acoustical Correlates*, 52 ACOUSTICAL SOC. AM. J. 1238, 1249 (1969).

6. *Heart Doctors Heed Telltale Voice*, BUSINESS WEEK, May 24, 1969, at 130.

tection field would become very interested. In fact a device has been produced which is capable of detecting false statements by means of voice analysis. The electronic device called a Psychological Stress Evaluator (PSE) has been tested for about two years with amazing results. The PSE was used to pick the truthful participant in the television program "To Tell The Truth" and was found to be accurate in 94.7% of the trials.<sup>7</sup>

Of course most of the work being done in the area of speech analysis must still be considered experimental, although without a doubt it can be said that recorded speech contains a wealth of information about the speaker which should be considered private. Few people would question the premise that it would be a violation of fourth and fifth amendments rights (and possibly others) to force a person without justifiable reason to be subjected to a lie detector test, a personality test, or a test which evaluates emotions,<sup>8</sup> but nevertheless section 2511 of the Omnibus Crime Control and Safe Streets Act of 1968 allows just such a violation.

A police officer, by recording a private telephone conversation or by recording a conversation between a suspect and an undercover agent with a hidden tape recorder, is able to gain access to such private information without the speaker's knowing or consenting to such revelation. Under the Crime Control Act this may be accomplished with a warrant without the knowledge of either party or such surveillance may be accomplished without a warrant provided one of the parties has consented to the interception. It is the purpose of this comment to discuss only the latter.

The cases which have considered the validity of consent to electronic surveillance have compared interception and recording of information to the disclosure of the conversation by one of the parties. The argument states that since one may divulge a conversation by testifying to its contents, then he should also be allowed either to record the conversation or to consent to its recording by a third party. Since anyone entering into a conversation assumes the risk that the other party may subsequently reveal his secrets he must also assume the risk that the conversation may be recorded.<sup>9</sup>

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7. *Big Brother Is Listening: Psychological Stress Evaluator*, TIME, 99:91-2 Je. 19, 1972.

8. Annot., 23 A.L.R.2d 1306 (1952); Annot., 25 A.L.R.2d 1407 (1952).

9. *White v. United States*, 401 U.S. 745 (1971); *Osborn v. United States*, 385 U.S. 323 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *Lopez v. United States*, 373 U.S. 427 (1963). See also Greenwalt, *The Consent Problem in Wiretapping and Eaves-*

The flaw in this argument is in its assumption that disclosure of a conversation by testimony and disclosure through a tape recording are essentially identical. As has been observed above, this is certainly not a valid assumption in light of the numerous characteristics of speech which are undetected by the unaided ear.

An analogy which illustrates this difference can be seen by noting the difference between describing a person and photographing the same person. While both methods are descriptive, a photograph certainly contains much more than a verbal description, and courts have had little trouble making the distinction.<sup>10</sup> Although one assumes the risk that a guest may verbally divulge his appearance he does not assume the risk that the same guest may photograph him without his consent.

This "assumption of risk" argument for allowing third party consent to electronic surveillance is mentioned at this point for introductory purposes only. A more detailed analysis of the cases accepting this argument will be presented later in the comment. At this juncture it is important to conclude that, based on the authority presented, there is a significant amount of private information which may be seized by recording the human voice. The full impact of this phenomenon on society and the legal ramifications of it are developed in the remainder of this comment.

## II. THE SOCIAL IMPACT

Electronic surveillance is not a very recent development in this country nor has it been limited to the private sector.

On his retirement from federal service in 1949, William Mellin, chief wiretapper for the Treasury, announced in the *Saturday Evening Post* that he had installed more than 10,000 wiretaps for the Treasury between 1934 and 1948. A stream of disclosures during the 1940's and early 1950's revealed that electronic eavesdropping was used by other federal agencies, such as the Post Office, and some congressional committees, and that intra-agency monitoring was employed by many federal executive departments.<sup>11</sup>

The total effect of this activity on society is difficult to measure, but without a doubt a portion of our privacy is lost to electronic

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*dropping: Surreptitious Monitoring With The Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189 (1968).

10. See Annot., 14 A.L.R.2d 750 (1950) for a collection of these types of cases.

11. A. WESTIN, *PRIVACY AND FREEDOM* 173 (1967).

surveillance. Psychologists tell us that a certain amount of privacy is required for good mental health and happiness in today's world. Robert Merton explained this idea as follows:

What is sometimes called 'the need for privacy'—that is, insulation of actions and thought from surveillance by others—is the individual counterpart to the functional requirement of social structure that some measure of exemption from full observability be provided for. Otherwise the pressure to live up to the details of all (and often conflicting) social norms would become literally unbearable; in a complex society, schizophrenic behavior would become the rule rather than the formidable exception it already is. 'Privacy' is not merely a personal predilection; it is an important functional requirement for the effective operation of social structure. Social systems must provide for some appropriate measure, as they would say in France, of *quant-a soi*—a portion of the self which is kept apart, immune from social surveillance.<sup>12</sup>

Coupled with, and closely related to the need for privacy is the need for a free flow of ideas in a democratic society. When people become so restrained by the fear of eavesdropping that they become overly cautious about what they say and to whom they say it, then the spread of new ideas and free thought becomes seriously hampered. As Justice Douglas put it in his dissent in *United States v. White*<sup>13</sup> (discussed fully later):

[M]ust everyone live in fear that every word he speaks may be transmitted or recorded and later repeated to the entire world? I can imagine nothing that has a more chilling effect on people speaking their minds and expressing their views on important matters. The advocates of that regime should spend some time in totalitarian countries and learn firsthand the kind of regime they are creating here.<sup>14</sup>

The opportunity to speak "off the record" is essential to most meaningful negotiations and other verbal exchanges among organizations and individuals. The kind of candor required for unrestrained negotiations is impossible if the parties are in constant fear of being recorded.

The *New York Times* reported a typical example of this need when a series of community fact-finding conferences on local problems in New York were taking place. The first open meetings of the con-

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12. R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE* 343 (1957). See also *Talley v. California*, 362 U.S. 60 (1960); Fried, *Privacy*, 77 *YALE L.J.* 475 (1968).

13. 401 U.S. 745 (1971).

14. 401 U.S. at 764-65 (footnotes omitted).

ference were marked by a lack of candor supposedly caused by the reluctance of the group to discuss racial problems in public. When the meetings were closed, civic, labor and civil rights leaders spoke frankly for the first time.<sup>15</sup>

When considered in this light, the argument that one must assume the risk of being recorded whenever he speaks to another is untenable. To equate the disclosure of a conversation by a friend in his own words to the disclosure of the actual speech by a tape recording is to ignore a fundamental attitude that we all possess. It is to ignore the feeling that anyone has when he realizes that he is speaking to a large audience.

Not only is electronic eavesdropping a potential threat to our social and political structure, it is also a violation of basic constitutional rights when it is not conducted under proper authority. An analysis of *Katz* and a consideration of the law of consent will show that valid consent may properly be given by both parties to a conversation, but one party may not waive the other's constitutional rights.

### III. THE LEGAL ARGUMENT

Before turning to a full discussion of the recent law relating to electronic eavesdropping, a brief history of the case law in this area is in order.

Perhaps the first important United States Supreme Court case involving electronic eavesdropping was *Olmstead v. United States*,<sup>16</sup> which held that messages transmitted over telephone wires are not subject to constitutional protection against search and seizure. The Court observed that a physical trespass must be involved before fourth amendment protection may be invoked.

The Supreme Court relied on this old "trespass doctrine" in *On Lee v. United States*,<sup>17</sup> where a friend of the defendant visited him while secreting a hidden transmitter which allowed police officers to overhear incriminating statements made by the defendant. Even though the friend did not testify, the officers were allowed to testify as to the statements transmitted to them by the hidden transmitter.

In *Lopez v. United States*<sup>18</sup> an IRS agent used a hidden tape recorder on his person to record an attempted bribe made to him by the

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15. New York Times, Dec. 12, 1964.

16. 277 U.S. 438 (1928).

17. 343 U.S. 747 (1952).

18. 373 U.S. 427 (1963).

defendant. The Court held that no eavesdropping had taken place and that the defendant had "misplaced his confidence" and had assumed the risk that the agent would disclose the conversation or record it.

The "assumption of risk" argument was used by the Court in *Hoffa v. United States*<sup>19</sup> to allow the admission of evidence obtained by an informer with a concealed tape recorder on his person. The informer was a trusted friend of Hoffa but was working for the police officers investigating Hoffa. The Court rationalized that since Hoffa assumed the risk that his confidant would disclose various conversations to the police then he also assumed the risk that the conversations would be recorded.

One of the first departures from this rationale occurred in *Osborn v. United States*,<sup>20</sup> where an informer was used in much the same circumstances as in *Hoffa* except that a warrant was obtained which allowed the recording. Instead of relying on *Lopez* and related cases, the Supreme Court chose to rest its decision on the fact that the police officers had obtained a warrant based on probable cause to believe that the incriminating statements would be made to the undercover agent.

Approximately one year after the *Osborn* case was decided, the Supreme Court reversed its previous stand on the requirement for a trespass by specifically overruling *Olmstead* in *Katz v. United States*,<sup>21</sup> in which the Court described the area of protection under the fourth amendment as being that area which a person reasonably regards as private. It must be reasonable as a matter of law for anyone to consider the area in question to be private. After *Katz* there is no requirement that a physical trespass be made since in *Katz* a microphone was placed outside a phone booth for purposes of eavesdropping on the defendant's conversation within the phone booth. Because the defendant was held to have had a reasonable expectation of privacy, the evidence so obtained was suppressed.

After *Katz* there was still some doubt as to the status of the misplaced confidence rule of *Lopez* and *Hoffa*. The question remained whether a party to the conversation (*e.g.*, an undercover agent) could record or consent to the recording of the defendant's statements. In *White v. United States*<sup>22</sup> the question was partially answered. The facts in *White* were similar to those in *On Lee* in that the defendant's

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19. 385 U.S. 293 (1966).

20. 385 U.S. 323 (1966).

21. 389 U.S. 347 (1967).

22. 401 U.S. 745 (1971).

conversation with an informer was transmitted by electronic means to police officers. In both cases the informer carried concealed electronic transmitting equipment.

The Court in *White*, at the request of the Assistant Attorney General, considered two issues in the case. The majority (5-4) agreed that *Katz* did not apply to *White* since the case of *Desist v. United States*<sup>23</sup> had ruled that the *Katz* decision was not retroactive. However, only four of the Justices (Justices White, Stewart, Blackmun, and Chief Justice Burger) agreed that the facts of *White*, viewed under the rationale of *Katz* and *Hoffa*, did not present a fourth amendment violation and therefore *On Lee* was still good law. Justice Black concurred in the result but based his decision on his dissent in *Katz* which argued that the fourth amendment did not apply to conversations. Justice Brennan based his opinion on *Desist* and specifically disagreed with the view that *Katz* did not apply to this case. Justices Harlan, Douglas, and Marshall dissented individually to both arguments which left the Court divided 4-4 on the issue of consensual eavesdropping.

Running through the Supreme Court's opinions in *On Lee*, *Hoffa*, *White*, and related cases, is the argument that where one party to a conversation consents to its surveillance by carrying a recorder, carrying a transmitter, permitting police officers to listen on an extension phone, or by some other means permitting the eavesdropping of the conversation, there has been no violation of the non-consenting party's fourth amendment rights. This is true, goes the argument, because a person who assumes the risk that his conversation will be verbally disclosed to others must also assume the risk that the conversation might be recorded or transmitted to others. The fourth amendment does not protect a person from his misplaced confidence in those with whom he communicates.

It is certainly true (assuming that the use of undercover agents is lawful)<sup>24</sup> that an undercover agent is free to testify as to conversations had with others. The above argument, however, makes no distinction between disclosing the contents of a conversation by testimony and disclosing an electronic recording of the same conversation. As discussed above, recorded speech contains much more than the communicated language. By proper analysis recorded speech may reveal identity, emotional state, certain personality traits, as well as the

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23. 394 U.S. 244 (1969).

24. Knecht, *Participant Eavesdropping And The Right of Privacy: Time To Strike A New Balance*, 8 CALIF. WESTERN L. REV. 283 (1972).

speaker's veracity, to name a few of the scientific advances which are continually being made. A speaker should not be held to have waived his constitutional protection from the confiscation of such personal information merely because he has assumed the risk that his conversation might be repeated. One's misplaced confidence in another creates only the risk that the conversation, not other personal information, will be disclosed.

Even disregarding these technical elements of speech, the adoption of the "assumption of risk" doctrine ignores a fundamental assumption that we make every day, and that is that when we speak to another in private we are heard by his ears alone and not by electronic devices.

In *Katz*, Justice Stewart speaking for the majority of the Court, explained the assumption as follows:

One who occupies it [the telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.<sup>25</sup>

Here the other party to the conversation had not consented to the surveillance, and it is just this exception to the *Katz* rule that the Court espoused in *White*.

If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.<sup>26</sup>

The Court went on to say, "Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect in the absence of a warrant."<sup>27</sup> According to the Court, it is not constitutionally justifiable to expect that the person to whom one is talking will not divulge the conversation by recording or transmitting it to police officers.

Upon further analysis it will be seen that this argument cannot hold up under the *Katz* rule which protects people and not places. It is not the method of eavesdropping but rather the eavesdropping itself from which a person is protected.

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25. 389 U.S. at 352.

26. 401 U.S. at 752. For an analysis of *White* see Saunders, *Electronic Eavesdropping And The Right To Privacy*, 52 BOSTON U.L. REV. 831 (1972).

27. 401 U.S. at 752.

Suppose the facts in *Katz* are changed so that the party to the conversation with the defendant consented to the bug on the telephone booth. Have the defendant's constitutional rights against electronic eavesdropping been waived or does the fact that a party to the conversation gave consent make the defendant's expectations constitutionally unjustifiable? The Court in *White* would probably take the latter view, for so far as the invasion of privacy is concerned, it should make no difference whether the police bug the phone booth, tap the telephone line, or listen in on an undercover agent's transmission. In the Court's view, so long as one party consents to the eavesdropping there has been no constitutional violation.

Under the modified facts of *Katz*, the officers are able to make the same invasion into the defendant's privacy that was forbidden when no consent existed. In other words the constitutionality of the eavesdropping seems to turn on whether consent has been given. When stated in this fashion, the analysis demands that we label the loss of constitutional protection as a waiver instead of concluding that consent vitiates any basis of a constitutional right. Allowing the waiver of constitutional rights in this manner by unauthorized third parties flies in the face of current notions of individual constitutional protection.<sup>28</sup> *Katz* should be read to protect the speaker not so much from what a party to the conversation may do on his own but rather what police officers may do through him or by his consent.

Even putting aside the argument relating to waiver, the conclusion that consent by a third party vitiates any claim of constitutional protection can only be reached by focusing entirely on the actions of the other party to the conversation rather than on the actions of the police force. If the defendant in *Katz* had an expectation of privacy, the fact that the person to whom he was speaking might have consented to the eavesdropping does not change his expectations. The actions by the police officers in *Katz* and in the "modified *Katz*" case are identical, *i.e.*, bugging the phone booth. Similarly, the actions by the police officers in *White* involved eavesdropping. To allow the decision to turn on a third party's consent is to rely on a concept of waiver, and labeling it something else only circumvents the real issue: constitutional protection from electronic surveillance without a warrant.

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28. Annot., 31 A.L.R.2d 1078 (1953). Even if by some twisting of logic it could be said that each party has a joint interest in the conversation, it has been held that a police officer may not rely on the consent of a joint owner to a search where the other joint owner is present and objects to the search. See *Tompkins v. Superior Court*, 27 Cal. Rptr. 889, 378 P.2d 113 (1963).

The Constitution of course was designed to protect everyone, including the guilty. However, with "hindsight" analysis it is easy to rationalize that a criminal who is planning a crime should be held to assume the risk that his conversations might be recorded. As the Court in *White* put it:

Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other.<sup>29</sup>

At first glance this explanation may seem justified, but the rationale is based on the assumption that the speaker is in fact guilty of some crime. If this assumption can be validly made, then there is no need for any surveillance at all. When we assume that a person is innocent, as we must, the argument crumbles. Indeed, the innocent as well as the guilty have every right to rely on the private nature of their conversations. If there is probable cause to believe a person is guilty of a crime or that he is planning a crime and that evidence of such crime may be available by intercepting certain conversations, then there should be little trouble in obtaining a warrant to conduct electronic surveillance as provided by the Crime Control Act. In this way the surveillance would be sanctioned by a magistrate based on probable cause rather than by a police officer based on some assumption of guilt. We would not for a moment allow a search of a person's home based on a police officer's assumption that the owner is guilty of possessing contraband; neither should we allow electronic surveillance based on a rationale which requires an assumption of guilt.

#### IV. CONCLUSION

By allowing electronic surveillance upon the consent of one of the parties to the conversation, the Omnibus Crime Control and Safe Streets Act makes it possible for several highly private elements of speech to be "seized" by law enforcement officers. Electronic eavesdropping, which involves the manifestation of a person's thoughts and ideas as well as the technical elements of speech, not only violates fourth amendment protection against unlawful searches and seizures but also strikes at the very heart of our democratic system which

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29. 401 U.S. at 752.

promises and relies on the concept of unmolested free thought and free communication.

By using the argument of "assumption of risk," the courts have seemingly overlooked the difference between recording or broadcasting a conversation and merely repeating it verbally. In addition, the use of the argument to find that no justifiable expectation of privacy exists once consent is given by a party to the conversation is invalid. Such an argument allows the *existence* of a constitutional right to stand or fall on consent of a third party.