UNITED STATES SUPREME COURT
Advance Opinion

JULIUS SILVERMAN et al., Petitioners,
v.
UNITED STATES
— US —, 5 L ed 2d 734, 81 S Ct — (No. 66)
Argued December 5, 1960, Decided March 6, 1961.

At defendants' trial in the United States District Court for the District of Columbia, on charges of violating the provisions of the District of Columbia Code relating to gambling, police officers were permitted to describe incriminating conversations engaged in by the defendants at their alleged gambling establishment, which were overheard by police officers in adjoining premises by means of a "spike mike," an electronic listening device consisting of a foot-long spike attached to a microphone, together with an amplifier, a power pack, and earphones. The officers inserted the spike into the party wall separating their observation post from the suspect premises until it contacted a heating duct serving the alleged gambling establishment, thus converting the entire heating system into a conductor of sound. The defendants' motion to suppress the evidence was denied. (166 F Supp 838) The defendants were found guilty in the District Court and their convictions were affirmed by the Court of Appeals for the District of Columbia Circuit (107 App DC 144, 275 F2d 173).

On certiorari, the Supreme Court reversed. In an opinion by STEWART, J., expressing the views of eight members of the court, it was held that the use of the "spike mike" did not constitute a violation of Sec. 605 of the Communications Act of 1934 (47 USC Sec. 605) but that its use without a warrant violated the Fourth Amendment.

DOUGLAS J., concurred on the ground that eavesdropping may constitute a violation of the Fourth Amendment even if accomplished without physical penetration of private premises by the use of a device such as a "spike mike."

Communications Sec. 9—interception of communication—use of "spike mike". 1. The use by police officers of a "spike mike," an electronic listening device consisting of a microphone attached to a foot-long spike, with an amplifier, a power pack, and earphones, by inserting the spike through a wall separating the police observation post from premises suspected of being used for gambling purposes, until the spike contacts a heating duct serving the suspect premises, so that conversations throughout the premises are audible to the officers through earphones, is not a violation of Sec. 605 of the Communications Act of 1934 (47 USC Sec. 605), which provides that no person not authorized by the sender shall "intercept" any communication and divulge the contents, although much of what the officers hear consists of the voices of persons in the premises as they talk on the telephone.

Search and Seizure Sec. 23 — eavesdropping — use of "spike mike". 2. Eavesdropping without warrant by means of a "spike mike", an electronic listening device consisting of a microphone attached to a foot-long spike, with an amplifier, a power pack, and earphones, by inserting the spike through a wall separating a police observation post from premises suspected of being used for gambling purposes, until the spike contacts a heating duct serving the suspect premises, so that conversations throughout the premises are audible to police officers through earphones, is a violation of the rights secured by the Fourth Amendment, the eavesdropping being accomplished by means of an unauthorized physical penetration into private premises.

Search and Seizure Sec. 23 — eavesdropping — local law. 3. Eavesdropping without warrant, accomplished by means of an unauthorized physical penetration into private premises, is a violation of the Fourth Amendment whether or not the invasion is a technical trespass under real property law relating to party walls.

Search and Seizure Sec. 5 — measure of rights. 4. Inherent Fourth Amendment rights are not inevitably measured in terms of ancient niceties of tort or real property law.

Search and Seizure Sec. 4 — basis of immunity. 5. At the very core of the Fourth Amendment is the right of man to retreat into his own home and there be free from unreasonable governmental intrusion.

Search and Seizure Sec. 23 — eavesdropping. 6. A federal officer may not without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

APPEARANCES OF COUNSEL

EDWARD BENNETT WILLIAMS argued the case of petitioners.

JOHN F. DAVIS argued the cause for respondent.

OPINION OF THE COURT

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were tried and found guilty in the District Court for the District of Columbia upon three counts of an indictment charging gambling offenses under the District of Columbia Code. At the trial police officers were permitted to describe incriminating conversations engaged in by the petitioners at their alleged gambling establishment, conversations which the officers had overheard by means of an electronic listening device. The convictions were affirmed by the Court of Appeals, 107 App DC 144, 275 F2d 173, and we granted certiorari to consider the contention that the officers' testimony as to what they had heard through the electronic instrument should not have been admitted into evidence. 363 US 801, L ed 2d 1145, 80 S Ct 1237.

The record shows that in the spring of 1958 the District of Columbia police had reason to suspect that the premises at 408 21st Street, N.W., in Washington, were being used as the headquarters of a gambling operation. They gained permission from the owner of the vacant adjoining row house to use it as an observation post. From this vantage point for a period of at least three consecutive days in April 1958, the officers employed a so called "spike mike" to listen to what was going on within the four walls of the house next door.

The instrument in question was a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones. The officers inserted the spike under a baseboard in a second floor room of a vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid "that acted as a very good sounding board." The record clearly indicates that the spike made contact with a heating duct serving the house occupied by the petitioners, thus converting their entire heating system into a conductor of sound. Conversations taking place on both floors of the house were audible to the officers through the

earphones, and their testimony regarding these conversations, admitted at the trial over timely objection, played a substantial part in the petitioner's convictions.

Affirming the convictions, the Court of Appeals held that the trial court had not erred in admitting the officers' testimony. The court was of the view that the officers' use of the spike mike had violated neither the Communications Act of 1934, 47 USC Sec. 605, cf. Nardone v. United States, 302 US 379, 82 L. ed 314, 58 S Ct 275, nor the petitioners' rights under the Fourth Amendment, cf. Weeks v. United States, 232 US 383, 58 L ed 652, 34 S Ct 341, LRA1915B 834, Ann Cas 1915C 1177.

In reaching these conclusions the court relied primarily upon our decisions in Goldman v United States, 316 US 129, 86 L ed 1322, 62 S Ct 993, and On Lee v United States, 343 US 747, 96 L ed 1270, 72 S Ct 967. Judge Washington dissented believing that, even if the petitioners' Fourth Amendment rights had not been abridged, the officers' conduct had transgressed the standards of due process guaranteed by the Fifth Amendment. Cf. Irvine v. California, 347 US 128, 98 L ed 561, 74 S Ct 381.

As to the inapplicability of Sec. 605 of the Communications Act of 1934, we agree with the Court of Appeals. That section provides that " . . . no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; . . ." While it is true that much of what the officers heard consisted of the petitioners' share of telephone conversations, we cannot say that the officers intercepted these conversations within the meaning of the statute.

Similar contentions have been rejected here at least twice before. In Irvine v California, 347 US 128, 131, 98 L ed 561, 568, 74 S Ct 381, the Court said: "Here the apparatus of the officers was not in any way connected with the telephone facilities, there was no interferences with the communications system, there was no interception of any message. All that was heard through the microphone was what the eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone." In Goldman v United States, 316 US 129, 134, 86 L ed 1322, 1327, 62 S Ct 993, it was said that "The listening in the next room to the words of (the petitioner) as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the coversation by one sitting in the same room."

In presenting here the petitioner's Fourth Amendment claim, counsel has painted with a broad brush. We are asked to reconsider our decisions in Goldman v United States (US) supra, and On Lee v United States, 343 US 747, 96 L ed 1270, 72 S Ct 967, supra. We are told that re-examination of the rationale of those cases, and of Olmstead v. United States 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376, from which they stemmed, is now essential in the light of recent and projected developments in the science of electronics. We are favoured with a description of "a device known as the parabolic microphone which can pick up a conversation three hundred yards away." We are told of a "still experimental technique whereby a room is flooded with a certain type of sonic wave," which, when perfected, "will make it possible to overhear everything said in a room without entering it or even going near it." We are informed of an instrument "which can pick up a conversation through an open office window on the opposite side of a busy street."

The facts of the present case, however, do not require us to consider the large questions which have been argued. We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in this area. For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. As Judge Washington pointed out without contradiction in the Court of Appeals: "Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the hearing duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants." 275 F2d, at 179.

Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment Rights. In Goldman v. United States, 316 US 129, 86 L ed 1322, 62 S Ct 993, supra, the Court held that placing a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Amendment. In On Lee v United States 343 US 747, 96 L ed 1270, S Ct 967, supra, a federal agent, who was acquainted with the petitioner, entered the petitioner's laundry and engaged him in an incriminating conversation. The agent had a microphone concealed upon his person. Another agent, stationed outside with a radio receiving set, was tuned in on the conversation, and at the petitioner's subsequent trial related what he had heard. These circumstances were held not to constitute a violation of the petitioner's Fourth Amendment rights.

But in both Goldman and On Lee the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In Goldman there had in fact been a prior physical entry into the petitioner's office for the purpose of installing a different listening apparatus, which had turned out to be ineffective. The Court emphasized that this earlier physical trespass had been of no relevant assistance in the later use of the detectaphone in the adjoining office. 316 US, at 134, 135. And in On Lee, as the Court said, " . . . no trespass was committed." The agent went into petitioner's place of business "with the consent, if not by the implied invitation, of the petitioner." 343 US, at 751, 752.

The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in Olmstead v. United States, 227 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376. In holding that the wiretapping there did not violate the Fourth Amendment, the Court noted that "the insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses." 277 US, at 457. "There was no entry of the houses or offices of the defendants." 277 US, at 464. Relying upon these circumstances, the Court reasoned that "the intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched." 277 US, at 465.

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 Amendments rights are not inevitably measurable in terms of ancient niceties of tort or real property law. See Jones v United States, 362 US 257, 266, 4 L ed 2d 697, 705, 80 S Ct 725, 78 ALR2d —; On Lee v. United States, supra (343 US at 752); Hester v United States, 265 U.S. 57,

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68 L ed 898, 44 S Ct 445; United States v Jeffers, 342 US 48, 51, 96 L ed 59, 64, 72 S Ct 93; McDonald v United States, 335 US 451, 454, 93 L ed 153, 157, 69 S Ct 191.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. Entick Carrington, 19 Howell's State Trials 1029, 1066; Boyd v United States, 116 US 616, 626-630, 29 L ed 746, 749-751, 6 S Ct 524. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

A distinction between the detectaphone employed in Goldman and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was "unwilling to believe that the respective rights are to be measured in fractions of inches." But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a contitutionally protected area. What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." Boyd v United States, 116 US 616, 635, 29 L ed 746, 752 6 S Ct 524. We find no occasion to re-examine Goldman here but we decline to go beyond it, by even a fraction of an inch.

Reversed.

SEPARATE OPINIONS

Mr. Justice **Douglas**, concurring.

My trouble with **stare decisis** in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to Goldman v United States, 316 US 129, 86 L ed 1322, 62 S Ct 993, while an electronic device that penetrates the wall, as here is not. Yet the invasion of privacy is as great in one case as in the other. The concept of "an unauthorized physical penetration into the premises," on which the present decision rests, seems to me to be beside the point. Was not the wrong in both cases done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device — even the degree of its remoteness from the inside of the house—is not measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate. I stated my views in On Lee v United States, 343 US 747, 96 L ed 1270, 72 S Ct 967, and adhere to them. Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded. Since it was invaded here, and since no search warrant was obtained as required by the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure, I agree with the Court that the the judgment of conviction must be set aside.

Mr. Justice **Clark** and Mr. Justice **Whittaker**, concurring.

In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion.