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Fourth Amendment Protection for Domestic Subversives

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FOURTH AMENDMENT PROTECTION FOR DOMESTIC SUBVERSIVES

Three defendants[1] sought disclosure of records of conversations seized through warrantless wiretaps[2] to determine whether the evidence being used against them was tainted thereby. Through an affidavit by the Attorney General,[3] the Government admitted that agents had overheard certain of defendant Plamondon's conversations while monitoring wiretaps installed to gather intelligence on domestic subversives. The Government contended that the surveillances were legal because the Attorney General had authorized them pursuant to the President's power to protect the national security. The federal district court found the seizures to be violative of Plamondon's fourth amendment rights and ordered full disclosure to him of the records of his overheard conversations.[4] The Government petitioned the Court of Appeals for the Sixth Circuit for a writ of mandamus to set aside the district court order. The petition was denied on the grounds that the surveillances were unconstitutional and that disclosure had been properly ordered.[5] On certiorari to the United States Supreme Court, *held*, affirmed: The fourth amendment mandates prior judicial approval of electronic surveillances conducted to safeguard the national security from subversion by domestic organizations. *United States v. United States District Court*, 92 S. Ct. 2125 (1972).

The Court's decisions in *Berger v. New York*[6] and *Katz v. United States*[7] firmly established the principle that the fourth amendment[8] protects a person's private conversations, not just his private premises.

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1. They were charged with conspiracy to destroy government property. Defendant Plamondon was also charged with the dynamite bombing of an office of the CIA.

2. Although the noted case involves wiretapping, the terms "wiretapping" and "electronic surveillance" will herein be used interchangeably in keeping with the Court's exclusive use of the broader term to include the narrower. The Court similarly failed to distinguish between wiretapping and electronic eavesdropping, or "bugging," in the following cases: Alderman v. United States, 394 U.S. 165 (1969) (bugging); Katz v. United States, 389 U.S. 347 (1967) (bugging); Berger v. New York, 388 U.S. 41 (1967) (bugging). Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510-20 (1970), also makes no such distinction. Apparently, the standards for national security wiretapping set forth in the noted decision apply equally to electronic eavesdropping (bugging).

3. United States v. United States Dist. Court, 92 S. Ct. 2125, 2128 n.2 (1972) (quoting Attorney General's affidavit).

4. United States v. Sinclair, 321 F. Supp. 1074 (E.D. Mich. 1971). Warrantless domestic national security wiretaps were also held unconstitutional in United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971).

5. United States v. United States Dist. Court, 444 F.2d 651 (6th Cir. 1971).

6. 388 U.S. 41 (1967) [hereinafter cited as *Berger*].

7. 389 U.S. 347 (1967) [hereinafter cited as *Katz*].

8. U.S. CONST. amend. IV provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Katz,[9] *Alderman v. United States*,[10] Title III of the Omnibus Crime Control and Safe Streets Act,[11] and years of extrajudicial electronic surveillances of domestic organizations[12] set the stage for the instant case.

In *Alderman*, the Court held that records of illegally overheard conversations must be disclosed—without previous determination of relevancy by the trial judge—to any defendant who has standing to object, in order to determine whether evidence against him grew out of the unlawful surveillance.[13]

With Title III, Congress sought to promote crime control in a manner consistent with the constitutional requirements for electronic surveillance pronounced in *Berger* and *Katz*. Electronic surveillance is permitted where evidence of specified crimes[14] is sought, and a warrant has been previously obtained through a meticulously specified procedure which requires detailed justification of the proposed surveillance.[15] Otherwise, wiretapping and bugging constitute violations of Title III.[16]

The Government sought an exception to the fourth amendment's warrant requirement where electronic surveillance is " 'deemed necessary to protect the nation from attempts of *domestic organizations* to attack and subvert the existing structure of Government.' "[17] Mr. Justice Powell, speaking for the Court, noted the absence, from the facts presented, of

9. Mr. Justice Stewart, speaking for the Court, stated: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is not a question presented by this case." Katz v. United States, 389 U.S. 347, 358 n.23 (1967). However, Mr. Justice White suggested that the warrant procedure could be dispensed with where the Attorney General has "considered the requirements of national security and authorized electronic surveillance as reasonable." *Id.* at 364 (concurring opinion). Mr. Justice Douglas, joined by Mr. Justice Brennan, sharply criticized the suggestion, calling it a "wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels 'national security' matters." *Id.* at 359 (concurring opinion). In his concurring opinion in Giordano v. United States, 394 U.S. 310 (1969), written after his opinion in *Katz*, Mr. Justice Stewart indicated that the above footnote in *Katz* referred only to national security wiretaps "relating to the gathering of *foreign intelligence information*." *Id.* at 314 (concurring opinion) (emphasis added).

10. 394 U.S. 165 (1969) [hereinafter cited as *Alderman*].

11. 18 U.S.C. §§ 2510-20 (1970) [hereinafter cited as Title III].

12. For a history of governmental wiretapping and its rationale, see Theoharis & Meyer, *The "National Security Justification" for Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L. REV. 749, 753-68 (1968).

13. In the instant case the Attorney General's affidavit stated: "I certify that it would prejudice the national interest to disclose the particular facts concerning these surveillances other than to the court *in camera*." 92 S. Ct. at 2128 n.2 (quoting Attorney General's affidavit). The Government's dilemma was recognized in *Alderman:*

> It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally . . . .

Alderman v. United States, 394 U.S. 165, 184 (1969).

14. 18 U.S.C. § 2516 (1970).

15. *Id.* at § 2518.

16. *Id.* at § 2511(1).

17. 92 S. Ct. at 2132 (quoting Attorney General's affidavit) (emphasis by the Court).

evidence of any involvement of a foreign power, and carefully emphasized the narrowness of the issue—the scope of the President's surveillance power with respect to "domestic organizations" only.[18]

The Government's principal argument rested on the following provision of Title III:

> Nor shall anything contained in this chapter be deemed to *limit the constitutional power of the President* to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.[19]

The Government suggested that " 'in excepting national security surveillances from the Act's warrant requirement Congress recognized the President's authority to conduct such surveillances without prior judicial approval.' "[20] The Court found that the legislative history of Title III contradicted the Government's interpretation of the quoted section.[21] Mr. Justice Powell found in the language and structure of the Act additional support for interpreting the section as a congressional disclaimer and expression of neutrality. He stated that, given the extraordinary care evident in the drafting of other sections, "it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph."[22]

Once the statutory argument was disposed of, the Court proceeded to examine the constitutional powers of the President in light of "the essential Fourth Amendment inquiry into the 'reasonableness' of the search and seizure in question, and the way in which that 'reasonableness' derives content and meaning through reference to the warrant clause."[23]

The Court recognized the President's duty to "preserve, protect and defend the Constitution of the United States"[24]—to preserve the public order—and further recognized that electronic surveillance could be a useful device in performing that duty. But the potentially Orwellian characteristics of electronic surveillance at the chief executive's discretion outweighed, in the Court's opinion, the Government's practical argu-

18. *Id.* at 2132-33 & n.8.

19. 18 U.S.C. § 2511(3) (emphasis added).

20. 92 S. Ct. at 2129 (quoting Government Brief).

21. *Id.* at 2131-32 & n.7. The Court stressed Senator Hart's remark:

> In addition, Mr. President, *as I think our exchange makes clear, nothing in Section 2511(3) even attempts to define the limits of the President's national security power under present law, which I have always found extremely vague . . . . Section 2511(3) merely says that if the President has such a power, then its exercise is in no way affected by title III.*

Id. at 2132, *quoting* 114 CONG. REC. 14751 (1968) (emphasis by the Court).

22. 92 S. Ct. at 2131. See also *id.* n.8.

23. *Id.* at 2133 (citation omitted).

24. U.S. CONST. art. II, § 1.

ments,[25] though Mr. Justice Powell stated that there was "pragmatic force to the Government's position."[26]

The Government's first pragmatic argument was that prior judicial review would "obstruct" the intelligence gathering process; furthermore, traditional warrant requirements were inappropriate because the primary objective of these surveillances was ongoing intelligence gathering, not specific criminal prosecutions.[27] However, the Court stated:

> Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.[28]

Secondly, the Government argued that

> courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contend[ed], involve "a large number of complex and subtle factors" *beyond the competence of courts to evaluate.*[29]

The Court responded that "[i]f the threat is too subtle or complex . . . to convey its significance to a court, one may question whether there is probable cause for surveillance."[30]

Finally, the Government suggested that disclosure to a magistrate of information involved in domestic security surveillances

> "would create serious potential dangers to the national security and to the lives of informants and agents . . . . [It would]

25. The Government unsuccessfully argued before the court of appeals that the President could authorize warrantless electronic surveillances because of "'*the historical power of the sovereign to preserve itself.*'" United States v. United States Dist. Court, 444 F.2d 651, 658 (6th Cir. 1971) (quoting Government Memorandum) (emphasis by the court). The language "'the inherent power of the President to safeguard the security of the nation'" was also used. *Id.* (quoting Government Supplemental Memorandum). No constitutional language was cited in support of this asserted power, and no limitations on it were suggested. The court found the cited case law inapplicable—six of the cases dealt with the war powers or foreign relations powers of the presidency—and pointed out that the inherent power doctrine had been squarely rejected by the Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). United States v. United States Dist. Court, 444 F.2d 651, 658-61 (1971). No such sweeping assertion of power can be found in the instant case.

26. 92 S. Ct. at 2138.

27. For an analysis of the criminal/non-criminal dichotomy, see Note, *The "National Security Wiretap": Presidential Prerogative or Judicial Responsibility*, 45 S. CAL. L. REV. 888, 890-95 (1972).

28. 92 S. Ct. at 2138. The Government's suggested test called for routine post-surveillance judicial approval of domestic security wiretaps except where "'the Attorney General's determination that the proposed surveillance relates to a national security matter is arbitrary and capricious . . .'" *Id.* at 2137 n.19 (quoting Government Brief). For an account of past and present investigative sins, see *id.* at 2140-45 (Douglas, J., concurring).

29. *Id.* at 2138 (quoting Government Reply Brief) (emphasis added).

30. *Id.*

> create a greater 'danger of leaks . . . , because in addition to the judge, you have the clerk, the stenographer and some other official like a law assistant or bailiff who may be apprised of the nature' of the surveillance."[31]

The Court was not persuaded and adhered to its consistent view, as stated in *Katz*, "that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . ."[32]

In concluding, Mr. Justice Powell emphasized the flexibility of the fourth amendment's standard of probable cause; "the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection."[33] He suggested that Congress could provide reasonable standards and procedures for domestic security warrants somewhat different from those set forth in Title III. Having found the seizure of Plamondon's conversations unconstitutional, the Court affirmed the order of disclosure.

Mr. Justice White, concurring in the result, suggested that the Court could have avoided the constitutional issue by finding the wiretaps illegal under Title III.[34] Mr. Justice Douglas, concurring, emphasized what was at stake:

> Here federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines simply to seize those few utterances which may add to their sense of the pulse of a domestic underground.
>
> *We are told that one national security wiretap lasted for 14 months and monitored over 900 conversations.*[35]

Two days after this decision, the Attorney General disclosed that the Government maintained "less than thirty" internal security wiretaps, of which "less than ten" involved domestic groups with *no significant relationship* to foreign powers; subsequently, *six* wiretaps were discontinued.[36]

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31. *Id.* (quoting Government Reply Brief).

> If, as the Government asserts, following that method poses security problems (because an indiscrete or corruptible judge or court employee might betray the proposed investigation), then surely the answer is to take steps to refine the method and eliminate the problems. No one could be in better position to help the courts accomplish this goal than the Attorney General.

United States v. United States Dist. Court, 444 F.2d 651, 666 (6th Cir. 1971).

32. Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted). The few recognized exceptions are designed to protect law enforcement officers and preserve evidence from destruction. *Id.* at 357-58 & nn.19-22.

33. 92 S. Ct. at 2139.

34. *Id.* at 2146 (concurring opinion).

35. *Id.* at 2141 (concurring opinion) (emphasis added). For a comparison of the respective average durations of court-ordered and executive-ordered electronic surveillances, see *id.* at 2145 (Appendix to concurring opinion of Justice Douglas).

36. Powers, *The Government is Watching*, THE ATLANTIC, Oct. 1972, at 57, where the author wonders whether the Attorney General may have been less than candid.

The Court avoided the issue of the scope of the Executive's surveillance power over foreign elements, leaving an ominous loophole—the vague "significant connection" standard[37]—which the Executive took advantage of without hesitation. The Justice Department's failure to discontinue all but six of the acknowledged wiretaps was an exercise of the kind of executive discretion the Court seemingly intended to curtail. The citizen is hardly reassured "that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur."[38]

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FIRST AMENDMENT RIGHTS VS. PRIVATE PROPERTY RIGHTS—THE DEATH OF THE "FUNCTIONAL EQUIVALENT"

When respondents began to distribute anti-Vietnam War handbills within the mall of petitioner's shopping center, uniformed security guards threatened to arrest them for trespassing. The respondents left peacefully, but then sought a declaratory judgment in federal district court to establish their right to exercise the freedoms of speech and press and to enjoin further interference from the petitioner. They argued that the shopping center was the "functional equivalent" of public property, and, therefore, the first and fourteenth amendments guaranteed their rights.[1] The petitioner, Lloyd Corporation, contended that since the shopping center was private property, it could enforce its strict and nondiscriminatory no-handbilling rule under the protection of the fifth and fourteenth amendments.[2] The federal district court of Oregon held for the respondents and enjoined interference by the petitioner.[3] This decision was

37. Although we attempt no precise definition, we use the term "domestic organization" in this opinion to mean a group or organization (whether formally or informally constituted) composed of citizens of the United States and which has *no significant connection with a foreign power, its agents or agencies.* No doubt there are cases where it will be difficult to distinguish between "domestic" and "foreign" unlawful activities directed against the Government of the United States where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers. But this is not such a case.

92 S. Ct. at 2133 n.8 (emphasis added).

38. *Id.* at 2132. For an argument that electronic surveillance is per se unconstitutional see Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition,* 118 U. Pa. L. REV. 169 (1969).

1. U.S. CONST. amend. I provides, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. XIV, § 1 provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . without due process of law . . . ."

2. U.S. CONST. amend. V provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Tanner v. Lloyd Corp., 308 F. Supp. 128 (D. Ore. 1970).