AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers/Presidential War and Foreign Affairs Powers

**United States v. United States District Court [the “Keith Case”], 407 U.S. 297 (1972)**

Robert Plamondon and two co-defendants were charged with the dynamite bombing of a CIA office in Ann Arbor, Michigan. During pretrial motions it was revealed that the government had wiretapped the defendants without first obtaining a search warrant. Plamondon’s lawyers argued that this warrantless surveillance violated the Fourth Amendment and that any other evidence obtained as a result of this illegal search should be excluded from the trial. In response, the Justice Department—headed by Attorney General John Mitchell—claimed that the surveillance was lawful as a reasonable exercise of the president’s independent Article II power to protect the national security, and that any information so obtained did not have to be disclosed to the defendants. The Nixon administration also relied, in part, on Title III of the Omnibus Crime Control and Safe Streets Act of 1968. This contained a provision that nothing in that law limits the president’s constitutional power to protect against the overthrow of the government or against “any other clear and present danger to the structure or existence of the government.”

District Court Judge Damon Keith disagreed and ordered the government to disclose the information. The government appealed Judge Keith’s ruling (hence the “*Keith Case*”), but its position was unanimously rejected by the Sixth Circuit Court of Appeals. It fared no better before the Supreme Court. In an 8–0 opinion (with newly appointed Justice Rehnquist not participating owing to his prior association with the case in the Justice Department) the justices found that the government’s internal security concerns did not justify departure from the customary requirement of judicial approval prior to initiation of a search or surveillance. The justices did not address the question of whether similar requirements were necessary for “foreign surveillance.” Is judicial oversight of intelligence gathering consistent with presidential responsibilities for national security? Would the constitutional implications be different if the case involved foreign groups?

JUSTICE POWELL, delivered the opinion of the Court.

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President’s power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government’s right to protect itself from unlawful subversion and attack and to the citizen’s right to be secure in his privacy against unreasonable Government intrusion. . . .

During pretrial proceedings, the defendants moved to compel the United States to disclose certain electronic surveillance information and to conduct a hearing to determine whether this information “tainted” the evidence on which the indictment was based or which the Government intended to offer at trial. In ­response, the Government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which Plamondon had participated. . . .

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Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U. S. C. § 2511 (3):

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U. S. C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. 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. . . . (Emphasis supplied.)

The Government relies on § 2511 (3). It argues 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.” The section thus is viewed as a recognition or affirmance of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case.

We think the language of § 2511 (3), as well as the legislative history of the statute, refutes this interpretation. . . .

Section 2511 (3) . . . merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them. . . .

It is important at the outset to emphasize the limited nature of the question before the Court. This case raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Nor is there any question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest. Further, the instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General’s affidavit in this case states that the surveillances were “deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government” (emphasis supplied). There is no evidence of any involvement, directly or indirectly, of a foreign power. . . .

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to “preserve, protect and defend the Constitution of the United States.” Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government. . . .

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance. Our decision in Katz v. United States (1967) refused to lock the Fourth Amendment into instances of actual physical trespass. Rather, the Amendment governs “not only the seizure of tangible items, but extends as well to the recording of oral statements . . . without any ‘technical trespass under . . . local property law.’ ” That decision implicitly recognized that the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of “ordinary” crime. . . . History abundantly documents the tendency of Government—­however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.” . . .

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society. . . .

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

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These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. . . . The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. . . .

It is true that there have been some exceptions to the warrant requirement. But those exceptions are few in number and carefully delineated; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. Even while carving out those exceptions, the Court has reaffirmed the principle that the “police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.”

The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. . . . It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering.

The Government further insists 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 contends, involve “a large number of complex and subtle factors” beyond the competence of courts to evaluate. . . .

We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. . . .

Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases. . . .

Thus, we conclude that the Government’s concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values. . . .

The judgment of the Court of Appeals is hereby

Affirmed.

JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. For, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy burden to show that “exigencies of the situation [make its] course imperative.” Other abuses, such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers, the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and “bugging” of which their victims are totally unaware. Moreover, even the risk of exclusion of tainted evidence would here appear to be of negligible deterrent value inasmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions. If the Warrant Clause were held inapplicable here, then the federal intelligence machine would literally enjoy unchecked discretion.

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.

. . .

That “domestic security” is said to be involved here does not draw this case outside the mainstream of Fourth Amendment law. Rather, the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that prohibition. For it was such excesses as the use of general warrants and the writs of assistance that led to the ratification of the Fourth Amendment. . . .

. . . [W]e are currently in the throes of another ­national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned. Senator Sam Ervin, who has chaired hearings on military surveillance of civilian dissidents, warns that “it is not an exaggeration to talk in terms of hundreds of thousands of . . . dossiers.” . . . More than our privacy is implicated. Also at stake is the reach of the Government’s power to intimidate its critics.

When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court’s long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients. . . .

. . . We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing.

JUSTICE WHITE, concurring.

. . . I would affirm the Court of Appeals but on the statutory ground urged by defendant-respondents without reaching or intimating any views with respect to the constitutional issue decided by both the District Court and the Court of Appeals. . . .

. . . Because I conclude that on the record before us the surveillance undertaken by the Government in this case was illegal under the statute itself, I find it unnecessary, and therefore improper, to consider or decide the constitutional questions which the courts below improvidently reached. . . .