



3-1-1971

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Recommended Citation

William F. McQuillen, *The Authorization of Warrantless Wiretapping by the President in National Security Matters Involving Domestic Dissidents.*, 3 ST. MARY'S L.J. (1971).

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COMMENTS

THE AUTHORIZATION OF WARRANTLESS WIRETAPPING BY THE PRESIDENT IN NATIONAL SECURITY MATTERS INVOLVING DOMESTIC DISSIDENTS

WILLIAM F. McQUILLEN

In a recent address to the nation's police chiefs, the Attorney General stated that wiretapping is the "most valuable" federal crime tool.¹ This "tool" is presently being employed without judicial authorization in matters which the Attorney General considers as affecting "national security."² The scope of "national security" has not been determined but it does include some domestic dissident organizations as well as hostile foreign powers.³ In four recent federal trials, the Government has contended that the President has the constitutional power and legislative authorization to wiretap in domestic matters affecting the national security.⁴ The Government has liberally construed Title 3, Section 2511(3) of the Omnibus Crime Control and Safe Streets Act,⁵ to include any internal organization which poses a threat to the present existence and structure of the Government. The adversaries to this theory of warrantless wiretapping admit that the President has plenary powers in the area of foreign affairs, but emphasize that he is limited in domestic matters.⁶

[I]n wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment. Since there is no reason why the government could not have complied with this requirement by obtaining the impartial judgment of a court before conducting the electronic surveillance in question here, it was obtained in violation of the Fourth Amendment.⁷

¹ 8 Cr. L. Rep. 2059 (1970).

² *United States v. Sinclair*, Criminal No. 44375 (E.D. Mich., January 26, 1971); *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971); *United States v. O'Neal*, Criminal No. KC-CR-1204 (D. Kan., September 1, 1970); *United States v. Brown*, 317 F. Supp. 531 (E.D. La. 1970); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3228 (U.S. Oct. 11, 1970) (No. 783); *United States v. Dellinger*, Criminal No. CR 180 (N.D. Ill., February 20, 1970).

³ *Id.*

⁴ *United States v. Sinclair*, Criminal No. 44375 (E.D. Mich., January 26, 1971); *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971); *United States v. O'Neal*, Criminal No. KC-CR-1204 (D. Kan., September 1, 1970); *United States v. Dellinger*, Criminal No. CR 180 (N.D. Ill., February 20, 1970).

⁵ 18 U.S.C. § 2510-20 (Supp. IV 1965-8).

⁶ *United States v. Sinclair*, Criminal No. 44375 (E.D. Mich., January 26, 1971); *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971).

⁷ *United States v. Smith*, Criminal No. 4277-CD, 12 (C.D. Cal., January 8, 1971); *citing United States v. Sinclair*, Criminal No. 44375, 10 (E.D. Mich., January 26, 1971).

Further, the exceptions enumerated in *Omnibus*, concerning the Attorney General authorizing wiretapping in certain cases of national security, are ineffectual since "the President is, of course, still subject to the Constitutional limitations imposed upon him by the Constitution."⁸

THE AUTHORIZATION OF WARRANTLESS WIRETAPPING BY THE
PRESIDENT FROM THE FEDERAL COMMUNICATIONS ACT OF
1934, UNTIL THE OMNIBUS CRIME CONTROL AND SAFE
STREETS ACT OF 1968

Although Section 605 of the Federal Communications Act prohibits the interception and divulgence or use of any wire communication by federal agents,⁹ it was interpreted to prohibit wiretapping only when followed by divulgence. Divulgence was said to be the introduction at trial of wiretapping evidence and did not include correspondence within the Department of Justice.¹⁰ Consequently, wiretapping continued but was not introduced as evidence in trials. In 1940, President Roosevelt issued a directive clarifying the Government's position concerning wiretapping in cases involving the "national security."¹¹ The President stated that he agreed with the Supreme Court policy contained in *Nardone v. United States*¹² but added that he felt sure that the Court did not intend the ban to apply to grave matters involving the national defense.¹³ He stated that federal agents are not precluded from using electronic eavesdropping in investigations against "fifth column" subversive organizations.¹⁴ The President further commented that he recognized the possible abuse of wiretapping in civil rights matters and expressly limited the Government's use of wiretapping in national security cases.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected

⁸ *Id.* at 6, citing *United States v. Sinclair*, Criminal No. 44375, 12 (E.D. Mich., January 26, 1971).

⁹ 47 U.S.C. § 605 (1964).

¹⁰ Brownell, *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195, 197 (1954).

¹¹ Theoharis and Meyer, *The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L.R. 749, 759 (1968), citing memorandum From President Roosevelt to Attorney General Jackson, Stephen Speingarn Papers.

¹² 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937), *rev'd and remanded* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

¹³ Theoharis and Meyer, *The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L.R. 749, 757 (1968), citing memorandum From President Roosevelt to Attorney General Jackson, Stephen Speingarn Papers.

¹⁴ *Id.*

spies. *You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.*¹⁵

An expanded version of this directive was issued by President Truman in 1946. The directive specified federal use of electronic eavesdropping in "cases vitally affecting the domestic security, or where human life is in jeopardy."¹⁶ President Truman's directive omitted any reference to the restriction President Roosevelt had imposed. The authority of the President to issue such a directive was not challenged in the courtroom since the directive authorized wiretapping for investigatory reasons and not for evidentiary purposes. During this period, there were numerous attempts to pass legislation which specifically excluded "national security" cases from the Federal Communications Act.¹⁷ No Congressional bill was enacted but the policy of reading an exception into the act continued. The Attorney General continued to authorize wiretapping when he felt that particular activities affected the national security of the country.¹⁸ It was not until 1967 that a substantial change occurred in the use of wiretapping by federal authorities. The Attorney General issued a memorandum which ordered the discontinuance of all federal wiretapping whether for evidentiary or investigatory purposes.¹⁹ He reaffirmed the policy of the Federal Communications Act but the limited national security exception was included.

[N]ational security investigations shall continue to be taken up with the Attorney General in the light of existing stringent restrictions.²⁰

In 1968, an amendment to the Criminal Justice Act of 1964 statutorily regulated wiretapping for the first time since the Federal Communications Act of 1934.²¹ Section 2511 made any unauthorized surveillance a serious crime. Electronic eavesdropping was authorized by the magistrate only after determining if there was sufficient probable cause. However, the act contained two exceptions:

¹⁵ *Id.* at 759 (emphasis added).

¹⁶ Theoharis and Meyer, *The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L.R. 749, 761 (1968) (emphasis added).

¹⁷ *Id.* at 761, 763. In 1951, 1953, 1954, 1958, and 1959, specific legislation was introduced and hearings held concerning legislation of wiretapping in "national security" cases.

¹⁸ Brownell, *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195 (1954). Theoharis and Meyer, *The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L.R. 749 (1968).

¹⁹ Theoharis and Meyer, *The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L.R. 749, 755 (1968), citing Attorney General Ramsey Clark's memorandum which ordered the cessation of wiretapping without his permission.

²⁰ *Id.*

²¹ 18 U.S.C. § 3006A (1964); 18 U.S.C. § 2510-20 (Supp. 1965-8). The wiretapping section of the amendment is referred to as Title III of the Omnibus Crime Control and Safe Streets Act.

1. 2518(7). Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State who reasonably determines that—
 - (a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and
 - (b) there are grounds upon which an order could be entered under this chapter to authorize such interception,
2. 2511(3). Nothing contained in this chapter or in section 605 of the Communications Act of 1934 . . . 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 against 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 clear and present danger to the structure or existence of the Government.

WIRETAPPING AND THE FOURTH AMENDMENT FROM
 OLMSTEAD V. UNITED STATES (1928) UNTIL
 KATZ V. UNITED STATES (1967)²²

In *Olmstead v. United States*, the Supreme Court stated that wiretapping was not a search within the meaning of the fourth amend-

²² Although historically wiretapping and electronic eavesdropping have been treated differently, two recent Supreme Court decisions concerned with eavesdropping did not attempt to distinguish between the two. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967); *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed.2d 1040 (1967). For the purposes of this comment, the terms will be used interchangeably, however, the historical development will be concerned only with pure wiretapping, that is, an invasion of conversation without a physical intrusion of any property. For a discussion of the unfolding of personal rights protected by the fourth amendment and the prior distinction between wiretapping and electronic surveillance, see Comment, *The Fourth Amendment Right of Privacy: Mapping For the Future*, 53 VA. L. REV. 1314 (1967); Comment, *Eavesdropping and the Constitution: A Reappraisal of the Fourth Amendment*, 50 MINN. L. REV. 378 (1965); Comment, *Admissibility of Illegally Seized Evidence, the Federal Exclusionary Rule—A Historical Analysis*, 38 U. DET. L.J. 635 (1961); Symposium, *The Wiretapping-Eavesdropping Problem: Reflections on Eavesdropping*, 44 MINN. L. REV. 811 (1960).

Subsequent to the submission of this Comment, the Supreme Court in *United States v. White* (9 Cr.L.Rep. 3037-April 5, 1971) ruled that electronic eavesdropping on a

ment.²³ The majority opinion, stated that a conversation passing over a telephone wire cannot be said to come within the constitutionally protected area of the fourth amendment. "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only."²⁴ There is no violation of the fourth amendment unless "there has been an official search and seizure of his person, or such a seizure of his papers or his tangible/material effects, or an actual physical invasion of his house or 'curtilage' for the purpose of making a seizure."²⁵ Further the Court stated:

Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.²⁶

Six years later, Congress passed the Federal Communications Act which had the effect of prohibiting the admissibility of all evidence obtained by wiretap. Although there is some doubt regarding the real intent of Section 605 of the Act, *Nardone v. United States* found prohibition of wiretapping to be the "plain mandate of the statute."²⁷ The Court in *Nardone* stated that the prohibition should not be read narrowly as to stultify the provision but should be read to effectuate the policy which Congress has formulated.²⁸

The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.²⁹

In *Benanti v. United States*,³⁰ 1957, Chief Justice Warren found a clear violation of Section 605 of the Communications Act, and therefore,

conversation with the connivance of one of the parties is not violative of the fourth amendment. This decision does not appear to re-establish the distinction between wiretapping and electronic eavesdropping except when the latter involves an agent or informer.

²³ 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 (1928).

²⁴ *Id.* at 464, 48 S. Ct. at 568, 72 L. Ed. at 950.

²⁵ *Id.* at 466, 48 S. Ct. at 568, 72 L. Ed. at 951.

²⁶ *Id.* at 465-66, 48 S. Ct. at 568, 72 L. Ed. at 951.

²⁷ Hendricks, *Eavesdropping, Wiretapping, and the Law of Search and Seizure—Some Implications of the Katz Decision*, 9 ARIZ. L. REV. 428, 438 (1968).

²⁸ 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 (1937), *rev'd and remanded* 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939).

²⁹ 308 U.S. 338, 341, 60 S. Ct. 266, 267, 84 L. Ed. 307, 311 (1939), *citing* *Silverstone Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319, 321 (1920). This is referred to as the "Fruit of the Poisonous Tree Doctrine."

³⁰ 355 U.S. 96, 78 S. Ct. 155, 2 L. Ed.2d 126 (1957).

refused to determine if the wiretap evidence was acquired in violation of the fourth amendment. "[C]onfronted as we are by this clear statute, and resting our decision on its provisions, it is neither necessary nor appropriate to discuss by analogy distinctions suggested to be applicable to the Fourth Amendment."³¹ In *Silverman v. United States*,³² 1961, the Court found that federal agents had not violated the Communications Act but had violated the fourth amendment. The agents had inserted a foot-long electronic listening device into the wall of the defendant's alleged gambling establishment. The Court stated that this act constituted an unauthorized physical penetration into private premises, without warrant, thus violative of the fourth amendment.³³ Although this decision did not have any effect on *Olmstead*, *Nardone* or *Benanti* because it involved a trespass, the decision was far-reaching for it was the first time the Court found a violation of the fourth amendment in electronic surveillance cases. Six years later, *Katz v. United States*³⁴ reversed *Olmstead* and held that wiretapping is violative of the fourth amendment unless there is antecedent judicial authorization. The Court determined that the fourth amendment protects *persons* and not just places.³⁵

[T]he reach of that Amendment [Fourth] cannot turn upon the presence or absence of a physical intrusion into any given enclosure The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.³⁶

Katz recognized but left for future resolution the issue of "whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security."³⁷

THE PRESIDENT'S INHERENT POWER TO CONDUCT ELECTRONIC
SURVEILLANCE IN NATIONAL SECURITY CASES
INVOLVING FOREIGN RELATIONS

An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an un-

³¹ *Id.* at 102, 78 S. Ct. at 158, 2 L. Ed.2d at 131.

³² 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed.2d 734 (1961).

³³ *Id.*

³⁴ 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed.2d 576 (1967).

³⁵ *Id.* at 351, 88 S. Ct. at 511, 19 L. Ed.2d at 582.

³⁶ *Id.* at 353, 88 S. Ct. at 512, 19 L. Ed.2d at 583.

³⁷ *Id.* at 358, n.23, 88 S. Ct. at 515, n.23, 19 L. Ed.2d at 586, n.23.

friendly foreign power and must be dealt with in the same fashion.³⁸

The Government contends that because the President has plenary and exclusive powers in the field of foreign affairs, he can authorize warrantless wiretapping against any organization or any individual who conducts activities which adversely affect the national security of the country. Acknowledging that the President "possess[es] no power not derived from the Constitution,"³⁹ the Government asserts that the President's power to act in foreign intelligence matters emanates from the constitutional grant of executive powers in Article II Section 1 and Article II Section 2.⁴⁰

The government contends that Section 1 vests in the President the power to take whatever action necessary to preserve, protect, and defend the Constitution. Section 2 is said to designate the President as the "sole organ of the nation in its external relations."

As early as 1875,⁴¹ the Supreme Court recognized the power of the President to employ secret agents to enter rebel lines to obtain intelligence information. In the same year, the Court stated that the President was "constitutionally invested with the entire charge of hostile operations."⁴² In 1936, the Supreme Court stated "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."⁴³ In 1937, the Supreme Court held:

[T]he conduct of foreign relations was committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power was not subject to judicial inquiry or decision. . . .⁴⁴

In 1939, the question of deportation was said to be "for the executive, not the judge. . . . It ought to be left to the untrammelled decision of the executive. . . . The executive has exclusive supervision of international relations."⁴⁵ In *Chicago and Southern Air Lines v. Waterman Steamship Corporation*,⁴⁶ 1948, the Supreme Court stated that all

³⁸ *United States v. Smith*, Criminal No. 4277-CD, 9 (C.D. Cal., January 8, 1971).

³⁹ *Ex parte Quirin*, 317 U.S. 1, 25, 87 L. Ed. 3, 11, 63 S. Ct. 2, 10 (1942).

⁴⁰ *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971); *United States v. Dellinger*, Criminal No. CR 180 (N.D. Ill., February 20, 1970).

⁴¹ *Totten v. United States*, 92 U.S. (2 Otto) 105, 23 L. Ed. 605 (1875).

⁴² *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87, 22 L. Ed. 528, 531 (1875).

⁴³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S. Ct. 216, 220, 81 L. Ed. 255, 262 (1936).

⁴⁴ *United States v. Belmont*, 301 U.S. 324, 328, 57 S. Ct. 748, 759, 81 L. Ed. 1134, 1138 (1937).

This comment is concerned only with the President's power in foreign affairs and does not undertake to discuss or analyze a comparison of the President's constitutional powers versus the Congressional power in foreign matters.

⁴⁵ *United States v. Carollo*, 30 F. Supp. 3, 7 (W.D. Mo. 1939).

⁴⁶ 333 U.S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948).

applications to engage in foreign air transportation were subject to approval by the President.

That aerial navigation routes and bases should be prudently correlated with facilities and plans for our own national defenses and raise new problems in conduct of foreign relations, is a fact of common knowledge.⁴⁷

The Court stated that "whatever of this order emanates from the President is not susceptible of review by the Judicial Department."⁴⁸

The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.⁴⁹

In 1959, the presidential power in foreign affairs was said to extend to travel restrictions.⁵⁰ A newspaperman's passport was denied because he refused to agree to a provision forbidding travel in five communist countries. The court stated that this was a foreign matter and the Constitution places that task in the hands of the Executive. "It is settled that in respect to foreign affairs the President has the power of action and the courts will not attempt to review the merits of what he does. The President is the nation's organ in and for foreign affairs."⁵¹

Although the powers of the President "have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances,"⁵² the power of the President to act in foreign affairs to provide for national security, has historically always been recognized by the courts.

EXPANSIONARY EFFECT OF THE FOURTH AMENDMENT ON THE PRESIDENT'S POWER TO AUTHORIZE WARRANTLESS WIRETAPPING IN MATTERS OF FOREIGN AFFAIRS

In cases subsequent to *Katz*, courts have been inclined to affirm the President's power in foreign matters but the reasoning of the courts has undergone a change as a result of the fourth amendment expansion to "protect people and not just places." In *Alderman v. United States*,⁵³ the Supreme Court held that the Government must disclose and make

⁴⁷ *Id.* at 108, 68 S. Ct. at 434, 92 L. Ed. at 574.

⁴⁸ *Id.* at 112, 68 S. Ct. at 436, 92 L. Ed. at 576.

⁴⁹ *Id.* at 111, 68 S. Ct. at 436, 92 L. Ed. at 576.

⁵⁰ *Worthy v. Herter*, 270 F.2d 905 (D.C. Cir. 1959).

⁵¹ *Id.* at 911.

⁵² 39 Op. Att'y Gen. 343, 347 (1939).

⁵³ 394 U.S. 165, 89 S. Ct. 961, 22 L. Ed.2d 176 (1969).

available to the defendant any conversation he participated in or which occurred on his premises and which was overheard during the course of an *illegal surveillance*. Although the Supreme Court did not specify what standards would be constitutional in the gathering of foreign intelligence, the Court did remand certain cases involved in foreign affairs to allow the district court to determine their legality.⁵⁴ None of the subsequent decisions by the district courts declared that the President lacked the power to authorize warrantless wiretapping in national security matters, but the reasoning differed among the courts. The district courts in *United States v. O'Baugh*⁵⁵ and *United States v. Stone*,⁵⁶ stated that the wiretapping occurred prior to *Katz*, therefore the *Olmstead* rule was in effect.⁵⁷ The courts stated that *United States v. Desist*⁵⁸ declared *Katz* wholly prospective thereby obviating the necessity of determining the constitutionality of the wiretap.⁵⁹

The district court in *United States v. Butenko*⁶⁰ declared: "[T]he legitimate needs of law enforcement will, under certain circumstances, justify an exception to the general warrant requirement of the Fourth Amendment."⁶¹

The very nature of the operation here involved, and the objective sought to be accomplished thereby, would certainly seem to justify an exception to the warrant requirements of the Fourth Amendment. It is undisputed . . . that wiretapping to protect the national security has been authorized by successive Presidents.⁶²

In *United States v. Cassius Clay* and *United States v. H. Rap Brown*, the courts found that the evidence obtained in the warrantless wiretap was not constitutionally prohibited, therefore the government did not have to allow the defendant an examination of all the logs.⁶³ To make this determination each court intermingled two independent arguments and decided that, considered together, there was sufficient grounds for denying the defendant's motions to suppress under *Katz* and to discover under *Alderman*.⁶⁴ The courts in *Clay* and *Brown*

⁵⁴ *Giordano v. United States*, 394 U.S. 310, 89 S. Ct. 1164, 22 L. Ed.2d 297 (1969).

⁵⁵ *United States v. O'Baugh*, 304 F. Supp. 767, 768 (D. D.C. 1969).

⁵⁶ *United States v. Stone*, 305 F. Supp. 75, 80 (D. D.C. 1969).

⁵⁷ *Id.*

⁵⁸ *Desist v. United States*, 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed.2d 248, *rehearing denied*, 395 U.S. 931, 89 S. Ct. 1766, 23 L. Ed.2d 251 (1969).

⁵⁹ *United States v. O'Baugh*, 304 F. Supp. 767 (D. D.C. 1969); *United States v. Stone*, 305 F. Supp. 75 (D. D.C. 1969).

⁶⁰ 318 F. Supp. 66 (D. N.J. 1970).

⁶¹ *Id.* at 71.

⁶² *Id.* at 71.

⁶³ *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3228 (U.S. Oct. 1, 1970) (No. 783); *United States v. Brown*, 317 F. Supp. 531 (E.D. La. 1970).

⁶⁴ *Id.*

balanced the rights of the defendant and the security of the nation and decided it would be intolerable for courts to nullify actions of the President taken on information properly held secret.⁶⁵

[I]t is the executive and not the judiciary, which alone possesses both the expertise and the factual background to assess the reasonableness of such a surveillance. From a purely practical standpoint, it would be ridiculous to place on a U.S. Commissioner the burden of deciding what is and is not a threat to national security.

The court does not believe the judiciary should question the decision of the executive department that such surveillances are reasonable and necessary to the protection of the national interest.⁶⁶

Both of these courts, held that the surveillance was lawful on the ground that the President has power as the Commander-in-Chief to authorize wiretapping for the purposes of gathering foreign information.⁶⁷ Although *Alderman* requires a disclosure of the contents of an electronic surveillance to the defendant only when obtained illegally, each court apparently felt compelled to substantiate the legality of the surveillance by a method other than total reliance on the President's constitutional power in foreign affairs. The courts made an "in camera" examination to determine if the defendants were prejudiced by the electronic surveillance. The examination by the courts demonstrated that the evidence was "untainted" and in no way prejudiced the defendant. The information was said to be "not germane to any issue in this criminal prosecution,"⁶⁸ and, "not one scintilla of evidence . . . could have in any way tainted the evidence produced by the government during defendant's trial."⁶⁹ In both *Clay* and *Brown*, the courts based their decisions on these two arguments and in neither case is it indicated that either argument, standing alone, would be sufficient.

Since *Katz*, the Government's claim of power to wiretap without judicial authorization in foreign affairs has been upheld by the courts for various reasons:

1. The fourth amendment is applicable in foreign affairs but the warrant requirement is excepted.⁷⁰

2. The combination of the President's powers as Commander-in-Chief and the innocuous evidence obtained by the wiretap.⁷¹

⁶⁵ *Id.*

⁶⁶ *United States v. Brown*, 317 F. Supp. 531, 536 (E.D. La. 1970), *citing* *United States v. Clay*, Criminal No. 67-11-94 (S.D. Tex., July 14, 1969), *aff'd*, 430 F.2d 165 (5th Cir. 1970).

⁶⁷ *United States v. Brown*, 317 F. Supp. 531, 536 (E.D. La. 1970); *United States v. Clay*, 430 F.2d 165, 171 (5th Cir. 1970).

⁶⁸ *United States v. Clay*, 430 F.2d 165, 171 (5th Cir. 1970).

⁶⁹ *United States v. Brown*, 317 F. Supp. 531, 534 (E.D. La. 1970).

⁷⁰ *United States v. Butenko*, 318 F. Supp. 66, 71 (D. N.J. 1970).

⁷¹ *United States v. Brown*, 317 F. Supp. 531 (E.D. La. 1970); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970).

3. *Katz* is wholly prospective, therefore any governmental warrantless wiretapping conducted prior to *Katz* is lawful under *Olmstead*.⁷²

It appears that courts are reluctant to challenge the plenary and unique power of the President in matters of foreign intelligence since "numerous non-judicial factors are relevant and the decision would probably be far removed from the consideration of probable cause."⁷³ However, the President's power has been challenged in matters of domestic affairs.

Unlike in the area of foreign affairs, in the area of domestic political activity the government can act only in limited ways.⁷⁴

CAN THE AUTHORITY OF THE PRESIDENT TO CONDUCT WARRANTLESS
WIRETAPPING IN MATTERS OF FOREIGN AFFAIRS BE EXPANDED TO
INCLUDE INTERNAL ORGANIZATIONS WHICH ARE DEEMED TO
CONSTITUTE A CLEAR AND PRESENT DANGER TO
THE EXISTENCE AND STRUCTURE OF
THE GOVERNMENT?

Article II

There are fundamental differences in the origin and nature of the power of the President in respect to foreign affairs and domestic affairs. "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."⁷⁵ Since there is no undefined residuum of power which the President can exercise when it seems to him to be in the public interest, the President's powers to authorize wiretapping in internal affairs without a warrant must be enumerated in the Constitution.⁷⁶

The Government found such power in the provisions of Article II which vest the executive power in the President. The President swears, in taking his oath of office, that he shall faithfully execute the office and will to the best of his ability preserve, protect and defend the Constitution.⁷⁷

⁷² *United States v. O'Baugh*, 304 F. Supp. 767, 768 (D. D.C. 1969); *United States v. Stone*, 305 F. Supp. 75, 80 (D. D.C. 1969).

⁷³ *United States v. Smith*, Criminal No. 4277-CD, 10 (C.D. Cal., January 8, 1971).

⁷⁴ *United States v. Smith*, Criminal No. 4277-CD, 10 (C.D. Cal., January 8, 1971), *citing* *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed.2d 438 (1969).

⁷⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315, 57 S. Ct. 216, 219, 81 L. Ed. 255, 260 (1936).

⁷⁶ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S. Ct. 863, 866, 96 L. Ed. 1153, 1166 (1951).

⁷⁷ *Id.*

[A]ny President who takes seriously his oath to "preserve, protect and defend the Constitution" will no doubt determine that it is not "unreasonable" to utilize electronic surveillance to gather intelligence information concerning those organizations which are committed to the use of illegal methods to bring about changes in our form of Government and which may be seeking to foment violent disorders.⁷⁸

It is further contended that the President's power to authorize wire-tapping derives from his role as Commander-in-Chief. As the nation's sole organ in foreign affairs the President is said to have the power to take any action to defend against any clear and present danger to the existence of the country.⁷⁹ The contention is that the presidential power should be implied from the aggregate of Article II Section 1 and Article II Section 2.⁸⁰ The inherent powers of the President emanating from Article II were contrived in general terms and are not subject to specific definition since their extent and limitations are largely dependent upon conditions and circumstances.⁸¹ The Government contends that in matters which vitally affect the domestic security, the conditions and circumstances justify reliance on the President's inherent constitutional power to protect the nation. Therefore he has the power: "(1) to authorize without a judicial warrant, electronic surveillance in 'national security' cases; and (2) to determine unilaterally whether a given situation is a matter within the concept of national security."⁸² The Government further contends that domestic dissident organizations are "akin to an unfriendly foreign power and must be dealt with in the same fashion."⁸³

The adversaries to this theory of Presidential power as contained in Article II contend that the Executive powers "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."⁸⁴ And, since *Katz* extended the scope of the Constitution to include wiretapping, the President's executive powers must not abridge the protections of the fourth amendment. Further, the power of the President to act in internal matters is neither expressly authorized in Article 2 nor can it be implied. Since all executive power is granted by the Constitution⁸⁵ and the Executive may not

⁷⁸ *United States v. Smith*, Criminal No. 4277-CD, 6 (C.D. Cal., January 8, 1971).

⁷⁹ This was the government's contention in *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1951) and *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971).

⁸⁰ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587, 72 S. Ct. 863, 866, 96 L. Ed. 1153, 1167 (1951).

⁸¹ 39 Op. Att'y Gen. 343, 347 (1939).

⁸² *United States v. Sinclair*, Criminal No. 44375, 5 (E.D. Mich., January 26, 1971).

⁸³ *Id.* at 9.

⁸⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S. Ct. 216, 221, 81 L. Ed. 255, 262 (1936).

⁸⁵ *Ex parte Quirin*, 317 U.S. 1, 25, 63 S. Ct. 2, 10, 87 L. Ed. 3, 11 (1942).

usurp judicial functions,⁸⁶ then the Executive may not authorize wiretapping without judicial warrant nor determine unilaterally whether a given situation is a matter within the concept of national security.⁸⁷ In response to the Government's assertion that domestic dissident organizations should be treated in the same manner as a hostile foreign power, the opponents of governmental warrantless wiretapping in internal affairs contend that the organizations are political and its members should "receive equal justice regardless of their political beliefs and persuasions."⁸⁸ To treat the dissident organizations in the same fashion as a foreign government is "to ride roughshod over numerous political freedoms which have long received constitutional protection."⁸⁹ It is the expansion of the President's power as Commander-in-Chief into an area other than military matters and foreign affairs.

In a Supreme Court decision, which restricted the power of the President to act in internal affairs, the Court concluded that the President's power to act in national security cases did not include the power to take possession of private property in order to prevent the stoppage of production of steel.⁹⁰ The President had claimed that the strike would endanger the national security of the country and that he had the inherent power to take any action to safeguard and protect the security of the country.⁹¹ The Supreme Court stated that the President does not have a residuum of power which he can exercise because it seems to him to be in the national interest.⁹²

The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces . . . [W]e cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power . . . to take possession of private property in order to keep labor disputes from stopping production. . . .⁹³

[O]ur history and traditions rebel at the thought that the grant of military power carries with it authority over civilian affairs. . . .⁹⁴

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power

⁸⁶ *United States v. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357, 94 L. Ed. 401 (1950).

⁸⁷ *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971).

⁸⁸ *United States v. Sinclair*, Criminal No. 44375, 9 (E.D. Mich., January 26, 1971).

⁸⁹ *United States v. Smith*, Criminal No. 4277-CD, 11 (C.D. Cal., January 8, 1971).

⁹⁰ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 587, 72 S. Ct. at 867, 96 L. Ed. at 1167.

⁹⁴ *Id.* at 632, 72 S. Ct. at 888, 96 L. Ed. at 1197.

to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. . . . The President's order does not direct that a Congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . .⁹⁵

. . . .

If we sanctioned the present exercise of power by the President, we would be expanding Article 2 of the Constitution and re-writing it to suit political conveniences of the present emergency.⁹⁶

The Interpretation of "Unreasonable Searches"

A further contention in the Government's defense of warrantless wiretapping is that the fourth amendment forbids only "unreasonable searches" and the use of a warrant is only one means of insuring that the search was reasonable.⁹⁷ The Government asserts that it is not unreasonable to authorize wiretapping against organizations who seek to subvert the existing structure of the Government, just as it is not unreasonable to conduct a search without warrant incident to an arrest and to conduct a "frisk" without prior judicial authorization. The contention is the interpretation of "reasonableness" must be construed in a "practical" manner.⁹⁸

In *United States v. Rabinowitz*,⁹⁹ the Court agreed that the test of the fourth amendment is determined by the facts and circumstances and not by any fixed formula. "The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready made litmus-paper test."¹⁰⁰ This case was subsequently overruled in *Chimel v. California*¹⁰¹ and the dissent by Justice Frankfurter in *Rabinowitz* has been adopted.

When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.¹⁰²

The Government's assertion has been expressly overruled by *Chimel* as being an undefined analysis which merely makes "reasonableness"

⁹⁵ *Id.* at 587, 72 S. Ct. at 867, 96 L. Ed. at 1167.

⁹⁶ *Id.* at 632, 72 S. Ct. at 887, 96 L. Ed. at 1197.

⁹⁷ *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971).

⁹⁸ *Id.*

⁹⁹ 399 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653 (1949).

¹⁰⁰ *Id.* at 63, 70 S. Ct. at 434, 94 L. Ed. at 659.

¹⁰¹ 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1969).

¹⁰² 399 U.S. 56, 70, 70 S. Ct. 430, 437, 94 L. Ed. 653, 662 (1949).

a subjective viewpoint and in effect, evaporates the protection the fourth amendment was designed to afford.¹⁰³

Omnibus

Another issue raised by the Government is that the President can authorize warrantless wiretapping under the authority of the Omnibus Crime Control and Safe Streets Act. The contention is that Section 2511(3) of *Omnibus* constitutes Congressional recognition of the President's authority to take whatever action necessary to protect the nation against a clear and present danger to the structure or existence of the Government.¹⁰⁴ Those opposed to this theory contend that the President's power must always be exercised in subordination to the provisions of the Constitution.

Since the President's conduct is "responsible to the Constitution,"¹⁰⁵ *Omnibus* cannot exempt him from the warrant requirements of the fourth amendment. Congress can neither expand nor limit the Constitutional powers of the President and Congress may not authorize the President to perform an act inconsistent with the applicable provisions of the Constitution.

Regardless of these exceptions in the criminal statute the President is, of course, still subject to the Constitutional limitations imposed upon him by the Constitution. This Court is in full accord with this rationale for it is axiomatic that the Constitution is the Supreme Law of the Land.¹⁰⁶

The Government also has asserted that the President's authority originates from the Roosevelt directive of 1940 directing wiretapping in cases involving subversive activities, and successive Presidents have continued this practice.¹⁰⁷ Opponents retort that the fact successive Presidents have authorized wiretapping to protect the security of the nation in matters ranging from investigations of employee loyalty, dissident organizations, and organized crime, to the conduct of espionage, does not in itself make the authorization constitutional.¹⁰⁸ Further,

¹⁰³ *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971). See generally Reed, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding*, 11 ARIZ. L. REV. 475 (1969).

¹⁰⁴ *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971); *United States v. Sinclair*, Criminal No. 44375 (E.D. Mich., January 26, 1971).

¹⁰⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319, 57 S. Ct. 216, 220, 81 L. Ed. 255, 262 (1936), citing 8 U.S. Senate Reports 24, *Committee on Foreign Relations*.

¹⁰⁶ *United States v. Sinclair*, Criminal No. 44375, 6 (E.D. Mich., January 26, 1971); citing *United States v. Smith*, Criminal No. 4277-CD, 4 (C.D. Cal., January 8, 1971).

¹⁰⁷ *Id.* *Katz v. United States*, 389 U.S. 347, 363, 88 S. Ct. 507, 518, 19 L. Ed.2d 576, 589 (1967), Justice White's concurring opinion: "Wiretapping to protect the security of the nation has been authorized by successive presidents."

¹⁰⁸ *Id.* In *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153 (1952) the Government had similarly contended the exercise of the president's

the directive may have been constitutional in 1940 when wiretapping was not recognized as a violation of the fourth amendment, but in light of *Katz*, the directive has been superseded by higher authority.¹⁰⁹

In a 1950 Supreme Court decision, the Court balanced the interest of the public security against the partial abridgement of a Constitutional right, and determined that the interest of the public prevailed.¹¹⁰ The Court found an internal organization to be a "conspiratorial and revolutionary junta, organized to reach ends . . . [or] and to use methods which are incompatible with our constitutional system."¹¹¹ This organization was said to constitute a threat to overthrow the established Government by force or other illegal methods, and the Court determined that the interest of the public took precedence over an individual right to the protection of the first amendment.

[T]he right of the public to be protected from evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and consistent recognition by this Court. . . .

Those organizations whose goal is to subvert the interest of the public cannot be free from all regulations merely because they are a political activity.¹¹²

The Court quoted Chief Justice Hughes' comment relating to civil liberties and the need for public order:

inherent constitutional power to take possession of private property was supported by historical precedent. The Court ruled that regardless of what powers successive presidents had assumed, the powers must emanate from the Constitution since the president can exercise no power not derived from the instrument itself.

¹⁰⁹ See generally *United States v. O'Baugh*, 304 F. Supp. 767 (D. D.C. 1969). *United States v. Stone*, 305 F. Supp. 75 (D. D.C. 1969).

¹¹⁰ *American Communication, C.I.O. v. Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950). This case pertains to a legislative grant of power to the President and the balancing of the national interests with the first amendment. Although the Court in *Robel v. United States*, 389 U.S. 658, 88 S. Ct. 419, 19 L. Ed.2d 508 (1967), determined that a statute, which was similar to that found constitutional in *Douds*, had an inhibiting effect on the exercise of first amendment rights and the Court in *Bryson v. United States*, 396 U.S. 64, 68, 90 S. Ct. 355, 358, 24 L. Ed.2d 264, 268 (1968), stated that *Douds* "belongs to a discredited regime," the decision has never been officially overruled. It is possible that the Government could rely on the balancing of interest concept and decide that the warrant requirement is not applicable in domestic affairs when national security is at stake. Although *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed.2d 1488 (1958), and *Communist Party in the United States v. Subversive Activities*, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed.2d 625 (1961), illustrate the balancing of rights theory in a more detailed and analytical manner, *Douds* is presented as an example of the concept because of the concurring and dissenting opinion of Justice Jackson. Justice Jackson foresaw the far-reaching effect the decision could have and attempted to prevent its application in national security cases involving domestic political organizations. Whether the basic concept of balancing of rights was completely emasculated by *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed.2d 438 (1969), remains an open question. *But cf.* Comment, *Eavesdropping at the Government's Discretion—First Amendment Implications of the National Security Eavesdropping Power*, 56 CORNELL L. REV. 161 (1970).

¹¹¹ *Id.* at 424, 70 S. Ct. at 696, 94 L. Ed. at 957.

¹¹² *Id.* at 398, 70 S. Ct. at 683, 94 L. Ed. at 943.

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.¹¹³

To apply the *Balancing of Rights* theory to warrantless wiretapping, it would have to be shown that the fourth amendment is dependent, as is the first amendment, upon the power of the Constitutional government to survive. There must be proof that the abridgement of the fourth amendment right is limited in scope and the protection afforded to the public is substantial. It must be clearly established that the protection against the overthrow of the Constitution by force or other illegal means prevails over the minor deprivation or infringement of the domestic dissident's right to be free from wiretapping.

[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.¹¹⁴

THE CURRENT APPROACH TO THE PRESIDENT'S POWER TO
AUTHORIZE WARRANTLESS WIRETAPPING IN MATTERS
OF INTERNAL SECURITY

In *Katz v. United States*, the Supreme Court acknowledged the problem of warrantless wiretapping in national security cases, but left the question unresolved.¹¹⁵ In a concurring opinion, Justice White stated:

We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.¹¹⁶

Justice Douglas and Justice Brennan objected to this view claiming it would give the President a wholly unwarranted green light to resort to wiretapping in any cases he labels as "national security" matters.¹¹⁷ Justice Douglas and Brennan claim that the President is not as detached and neutral as a magistrate must be.¹¹⁸

In *Giordana v. United States*,¹¹⁹ the Court again admitted that the issue of warrantless wiretapping in national security matters *remains open*. "[W]e have left that threshold question for the District Courts

¹¹³ *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 765, 85 L. Ed. 1049, 1052 (1941).

¹¹⁴ *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159, 83 S. Ct. 554, 563, 9 L. Ed.2d 644, 656 (1963).

¹¹⁵ 383 U.S. 347, 358, n.23, 88 S. Ct. 507, 515, n.23, 19 L. Ed.2d 576, 586, n.23 (1967).

¹¹⁶ *Id.* at 364, 88 S. Ct. at 518, 19 L. Ed.2d at 589.

¹¹⁷ *Id.* at 359, 88 S. Ct. at 515, 19 L. Ed.2d at 587.

¹¹⁸ *Id.* at 360, 88 S. Ct. at 516, 19 L. Ed.2d at 587.

¹¹⁹ 394 U.S. 310, 89 S. Ct. 1163, 22 L. Ed.2d 297 (1969).

to decide. . . ."¹²⁰ There have been four district court cases which have ruled on this "threshold question." Two of them have agreed with Justice White's viewpoint¹²¹ and two have held that the President does not have the power to authorize wiretapping without warrant in wholly domestic situations.¹²²

In *United States v. Smith*, the Federal District Court of California determined:

[S]ince there is no reason why the government could not have complied with this requirement [warrant] by obtaining the impartial judgment of a court before conducting the electronic surveillance in question here, it was obtained in violation of the Fourth Amendment. . . . This court is forced to conclude that in wholly domestic situations there is no national security exemption from the warrant requirement of the Fourth Amendment.¹²³

The court discussed the Government's theories that (1) the President has inherent Constitutional power, (2) the 1968 Crime Control Act excepted the President from the warrant requirement, (3) the fourth amendment prohibits only "unreasonable searches and seizures," and the contention (4) "that the decision to initiate surveillance in this type of case must be based on a wide variety of considerations and on many pieces of information which cannot be presented to a magistrate." Judge Ferguson responded to these contentions:

(1) The President may have the inherent constitutional power in foreign affairs but he is limited in domestic affairs.¹²⁴

(2) *Omnibus* cannot exempt the President from complying with the Constitution. "[T]he President is, of course, still subject to the constitutional limitations imposed upon him by the Fourth Amendment."¹²⁵

(3) *Chimel* established the warrant requirement as not merely one method of satisfying the "reasonable requirement" but it is the only method other than justified by absolute necessity.¹²⁶

(4) "This seems to be an attempt to invoke the 'practicality' exception to the warrant procedure. In cases involving foreign affairs this argument might very well prevail. In that situation, numerous non-judicial factors are relevant and the decision would probably be far removed from the consideration of probable cause.

¹²⁰ *Id.* at 314, 89 S. Ct. at 1165, 22 L. Ed.2d at 300.

¹²¹ *United States v. Dellinger*, Criminal No. CR 180 (N.D. Ill., February 20, 1970); *United States v. O'Neal*, Criminal No. KC-CR-1204 (D. Kan., September 1, 1970).

¹²² *United States v. Smith*, Criminal No. 4277-CD (C.D. Cal., January 8, 1971); *United States v. Sinclair*, Criminal No. 44375 (E.D. Mich., January 26, 1971).

¹²³ *United States v. Smith*, Criminal No. 4277-CD, 12 (C.D. Cal., January 8, 1971).

¹²⁴ *Id.* at 6.

¹²⁵ *Id.* at 4.

¹²⁶ *Id.* at 7.

However, this argument is totally inapplicable in a criminal proceeding in a federal court involving a domestic situation."¹²⁷

The court discussed another problem that was not determinative of the case but an answer to the Government's assertion that the President cannot recognize limitations on his power to act in national security matters established by the judiciary. The court acknowledged that this might hold true in foreign affairs but it is not applicable in domestic situations.

[L]imitations which are artificial in the international sphere, are reasonable and proper when solely domestic subversion is involved. In the domestic area, it is important to remember that there are numerous questions which cannot be answered by recognition of the importance of the national security. The Constitution, . . . , was written so as to strike a balance between the protection of political freedom and the protection of the national security interest. To guarantee political freedom, our forefathers agreed to take certain risks which are inherent in a free democracy. It is unthinkable that we should now be required to sacrifice those freedoms in order to defend them. The court, therefore, finds that the electronic surveillance conducted in this case was constitutionally improper.¹²⁸

In *United States v. Sinclair*, three White Panthers were charged with bombing an office of the Central Intelligence Agency. The district court substantially relied on the California decision and determined that the Government violated the fourth amendment by wiretapping the domestic dissidents without prior judicial authorization.¹²⁹

In the opinion of this Court, the position of the Attorney General is untenable. It is supported neither historically, nor by the language of the Omnibus Crime Act. Such power held by one individual was never contemplated by the framers of our Constitution and cannot be tolerated today. This Court adopts the holding of Judge Warren J. Ferguson in *United States v. Smith*.¹³⁰

In the *Chicago Riots* case,¹³¹ the defendant Dellinger argued that the surveillances authorized by the President without warrant against "home-grown organizations" were illegal and made a motion for disclosure of all the illegal surveillances. The defendant claimed that the anti-war demonstrators were solely domestic organizations, not akin to any foreign nation, and the President exceeded his Constitutional

¹²⁷ *Id.* at 10.

¹²⁸ *Id.* at 14.

¹²⁹ *United States v. Sinclair*, Criminal No. 44375 (E.D. Mich., January 26, 1971).

¹³⁰ *Id.* at 10.

¹³¹ *United States v. Dellinger*, Criminal No. CR 180 (N.D. Ill., February 20, 1970).

powers in authorizing the wiretap.¹³² The Government contended that the surveillances were legal in that they were authorized by the President in the valid exercise of his national defense power.

It is notorious that there are organizations in this country which intend to 'attack and subvert the existing form of our government.' Moreover, there has been an 'increasing number of instances in which federal troops have been called upon by the states to aid in the suppression of riots.' In such state of affairs, it is both 'reasonable (hence permissible under the Fourth Amendment) and within the inherent power of the executive' to utilize electronic surveillance to gather intelligence information in order to protect the nation from danger. Moreover, the determination to take that step 'comes within the competence of the executive' and the warrant procedure is inappropriate because it would require the judiciary to make determinations, such as appraisal of danger to the national security, for which it is ill-suited.¹³³

The Government further contended that most of the overheard conversation took place before *Katz* which has been determined to be wholly prospective. The Government reasoned that prior to *Katz*, wiretapping was not prohibited by the fourth amendment, therefore, the Roosevelt directive was controlling.¹³⁴ Further, the Government claimed they had no intention of introducing the evidence at the trial thus Section 605 of the Federal Communications Act was inapplicable.¹³⁵

The court determined that the defendant was not entitled to disclosure under *Alderman*, since *Alderman* directed only the disclosure of illegally obtained information and the evidence now in question was obtained legally by the Government.¹³⁶ Similarly, in *United States v. O'Neal*,¹³⁷ the district judge made an *in court ruling* that surveillance carried out pursuant to the authorization by the President involving the President's national security power is lawful. The courts in *Dellinger* and *O'Neal* concluded that the President's national security power includes domestic dissidents as well as hostile foreign nations.

CONCLUSION

In the field of foreign affairs, the President has plenary powers which cannot be limited by the judiciary, but in the domestic area, he is

¹³² *Id.*

¹³³ Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 194-95 (1969).

¹³⁴ *United States v. Dellinger*, Criminal No. CR 180 (N.D. Ill., February 20, 1970).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Criminal No. KC-CR-1204 (D.C. Kan., September 1, 1970).

severely restricted. The President does not have any residuum of power to act in wholly internal matters which he deems to be a matter of national security. The fourth amendment requires prior authorization by a magistrate in order to satisfy the "reasonableness requirement." There is a presumption of unreasonableness in the absence of a search warrant.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties cast in the role of adversary, in national security cases.¹³⁸

There is no justifiable reason to allow the Government to circumvent the requirements of the fourth amendment in domestic matters. The President has never claimed that he need not act in subordination to the Constitution but he has, nevertheless authorized wiretapping without a warrant.

Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.¹³⁹

Writs of assistance and general warrants have been called puny instruments of tyranny and oppression compared with wiretapping.¹⁴⁰ The framers of the Constitution "conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."¹⁴¹ It would seem that in order to tolerate an infringement of this right, the public should at least be insulated from unreasonable and arbitrary intrusions. Judicial control could protect the public against overzealous defenders of the national security.

In *National Security Justification For Electronic Eavesdropping: An Elusive Exception*,¹⁴² the authors expressed the fear that the National

¹³⁸ *Katz v. United States*, 389 U.S. 347, 359, 88 S. Ct. 507, 516, 19 L. Ed.2d 576, 587 (1967).

¹³⁹ *Olmstead v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575, 72 L. Ed. 944, 960 (1928) (Justice Brandeis' dissenting opinion).

¹⁴⁰ *Id.* at 476, 48 S. Ct. at 571, 72 L. Ed. at 955.

¹⁴¹ *Id.* at 478, 48 S. Ct. at 572, 72 L. Ed. at 956.

¹⁴² Theoharis and Meyer, *The "National Security" Justification For Electronic Eavesdropping: An Elusive Exception*, 14 WAYNE L.R. 749, 759 (1968).

Security provision would be primarily directed against internal political organizations such as the Black Power movement and the peace movement.¹⁴³ This fear has become a reality. The Attorney General has stated that he considers the national security eavesdropping power to be applicable in investigations against domestic dissident radicals.¹⁴⁴ This power was used by the Government against the peace demonstrators in Chicago during the Democratic National Convention of 1968, and was used in investigations against the Black Panthers.¹⁴⁵ The Government did not deem it necessary to secure a warrant since the Attorney General had authorized the surveillances under the authority of the President's national security powers.

The fourth amendment could be satisfied by submitting a warrant application to a magistrate specifying the details of the offense, the location of the proposed eavesdrop, the type of communication to be seized, the identities of the parties and the duration of the eavesdrop. If the magistrate feels that there is probable cause, the Government would be free to eavesdrop for a limited period.

Through this procedure. . . , we as citizens are assured of our constitutional right to be free from unreasonable searches and seizures. Prior to the issuance of any search warrant the Court must independently review the request to search and make an objective determination whether or not probable cause of some criminal activity exists, which activity would make the search reasonable and not in violation of the Fourth Amendment rights. Absent such a requirement of an objective determination by a magistrate, law enforcement officials would be permitted to make their own evaluation as to the reasonableness, the scope and the evidence of probable cause for a search. This Court is loath to tolerate the existence of such a condition.¹⁴⁶

¹⁴³ *Id.* at 771.

¹⁴⁴ Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169 (1969).

¹⁴⁵ *Id.*

¹⁴⁶ *United States v. Sinclair*, Criminal No. 44375, 7-8 (E.D. Mich., January 26, 1971).

ADDENDUM

United States v. Sinclair has been affirmed by the United States Court of Appeals for the Sixth Circuit. The Attorney General has announced that he will appeal the decision to the Supreme Court.