"We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation."

United States v. United States District Court

407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).

The United States charged three people with conspiring to destroy government property and one of the three with dynamiting a CIA office. During pretrial proceedings, the defendants asked the judge to order the government to produce information gathered against them by electronic surveillance to determine if the government's case was "tainted" by illegally obtained evidence. The Nixon administration conceded that it had used wiretaps without obtaining a warrant as required by Title III of the Omnibus Crime Control and Safe Streets Act, but asserted that the President's "inherent power" to protect national security was sufficient authority for such, even though the source of danger was domestic not foreign.

The district judge held that the wiretaps, without a warrant, violated the Fourth Amendment. The Court of Appeals for the Sixth Circuit agreed, and the government sought and obtained certiorari.

Mr. Justice **POWELL** delivered the opinion of the Court. . . .

The issue before us . . . involves the delicate question of the President's power . . . 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 . . . 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. . . .

I

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–2520, authorizes the use of electronic surveillance for classes of crimes carefully specified. . . . Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression. Much of Title III was drawn to meet the constitutional requirements for electronic surveillance enunciated by this Court in Berger v. New York (1967) and Katz v. United States (1967).

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 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. . . . At most, this [language] is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this. . . . But so far as the use of the President's electronic surveillance power is concerned, the language is essentially neutral.

Section 2511(3) certainly confers no power. . . . It 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. The language of subsection (3), here involved, is to be contrasted with the language of the exceptions set forth in the preceding subsection. Rather than stating that warrantless presidential uses of electronic surveillance "shall not be unlawful" and thus employing the standard language of exception, subsection (3) merely disclaims any intention "to limit the constitutional power of the President."

The express grant of authority to conduct surveillances is found in § 2516, which authorizes the Attorney General to make application to a federal judge when surveillance may provide evidence of certain offenses. These offenses are described with meticulous care and specificity.

Where the Act authorizes surveillance, the procedure to be followed is specified in § 2518. Subsection (1) thereof requires application to a judge of competent jurisdiction for a prior order of approval, and states in detail the information required in such application. Subsection (3) prescribes the necessary elements of probable cause which the judge must find before issuing an order authorizing an interception. Subsection (4) sets forth the required contents of such an order. Subsection (5) sets strict time limits on an order. Provision is made in subsection (7) for "an emergency situation" found to exist by the Attorney General (or by the principal prosecuting attorney of a State) "with respect to conspiratorial activities threatening the national security interest." In such a situation, emergency surveillance may be conducted "if an application for an order approving the interception is made . . . within forty-eight hours." If such an order is not obtained, or the application therefor is denied, the interception is deemed to be a violation of the Act.

In view of these and other interrelated provisions delineating permissible interceptions of particular criminal activity upon carefully specified conditions, 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. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.

The legislative history of § 2511(3) supports this interpretation. . . .

II

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 [Act]. 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. *Katz*; *Berger*. 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 his country. . . . There is no evidence of any involvement, directly or indirectly, of a foreign power.

Our present inquiry, though important, is therefore a narrow one. It addresses a question left open by *Katz*: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security. . . ."

. . . 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 . . . may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government. The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946. . . .[1]

. . . The covertness and complexity of potential unlawful conduct against the Government and the necessary dependency of many conspirators upon the telephone make electronic surveillance an effective investigatory instrument in certain circumstances. The marked acceleration in technological developments and sophistication in their use have resulted in new techniques for the planning, commission, and concealment of criminal activities. It would be contrary to the public interest for Government to deny to itself the prudent and lawful employment of those very techniques which are employed against the Government and its law-abiding citizens.

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[*]In fact at least since 1940.—**Eds.**

It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." Miranda v. Arizona (1966) (White, J., dissenting). And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered. . . .

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development. . . . There is . . . 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. *Katz*; *Berger*; Silverman v. United States (1961). Our decision in *Katz* 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. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. . . . 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." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. . . . 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.

III

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.

Though the Fourth Amendment speaks broadly of "unreasonable searches and seizures," the definition of "reasonableness" turns, at least in part, on the more specific commands of the warrant clause. . . . [That clause] has been "a valued part of our constitutional law for decades.

. . . It is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government." . . .

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. Their duty and responsibility is to enforce the laws, to investigate, and to prosecute. *Katz.* But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. 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 may well be that, in the instant case, the Government's surveillance . . . was a reasonable one which readily would have gained prior judicial approval. . . . The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. The independent check upon executive discretion is not satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. Beck v. Ohio (1964).

It is true that there have been some exceptions to the warrant requirement. But those exceptions are few in number and carefully delineated, *Katz*; in general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction. . . .

The Government argues that . . . the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. 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. . . .

As a final reason for exemption from a warrant requirement, the Government believes that disclosure to a magistrate of all or even a significant portion of the information involved in domestic security surveillances "would create serious potential dangers to the national security and to the lives of informants and agents. . . ." These contentions in behalf of a complete exemption from the warrant requirement, when urged on behalf of the President and the national security in its domestic implications, merit the most careful consideration. We certainly do not reject them lightly, especially at a time of worldwide ferment. . . .

But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its

purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. 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. We recognize . . . the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment. In this case we hold that this requires an appropriate prior warrant procedure.

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. . . . Title III of the [Act] already has imposed this responsibility on the judiciary in connection with such crimes as espionage, sabotage, and treason, each of which may involve domestic as well as foreign security threats. Moreover, a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge. . . .

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. . . .

IV

We emphasize . . . the scope of our decision. . . . [T]his case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents. . . .

The judgment of the Court of Appeals is hereby

Affirmed.

The Chief Justice [**BURGER**] concurs in the result.

Mr. Justice **REHNQUIST** took no part in the consideration or decision of this case.

Mr. Justice **DOUGLAS**, concurring. . . .

Mr. Justice **WHITE** concurring in the judgment. . . .

Editors' Notes

(1) **Query:** In Part **III** of his opinion Powell said that the Court must "balance the basic values at stake." What relative weights did Powell assign to the values in conflict here? How did he justify this relative weighing?

(2) **Query:** What was Powell's conception of WHAT the Constitution includes? How did he link that conception (or how can we link it) to the approach to constitutional interpretation he followed?

(3) **Query:** How did Powell answer the question WHO?

(4) Laird v. Tatum (1972), decided after *U.S. District Court*, involved a class action for an injunction against Army intelligence surveillance of people accused of no crime but suspected of political radicalism. Plaintiffs claimed that this intimate watch on their lives had "a chilling effect" on freedoms protected by the First Amendment. By a 5–4 vote, the Court held that the plaintiffs lacked "standing to sue"—that is, they had not shown real injury to a specifically guaranteed legal right.