For the Record . . .

Constitutional Protections Against Baseless Searches

Justice Powell, writing for the majority in yesterday's Supreme Court ruling on electronic surveillances:

Over two centuries ago, Lord Mansfield held that common law principles prohibited warrants that ordered the arrest of unnamed individuals whom the *officer* might conclude were guilty of seditious libel. "It is not fit," said Mansfield, "that the receiving or judging of the information ought to be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." . . .

Lord Mansfield's formulation touches the very heart of the Fourth Amendment directive: that where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation. Inherent in the concept of a warrant is its issuance by a "neutral and detached magistrate." . . . The further requirement of "probable cause" instructs the magistrate that baseless searches shall not proceed.

The 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 . . . 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 . . .

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. . .