

# Excerpts From Ruling on Wiretapping

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WASHINGTON, June 19—Following are excerpts from the Supreme Court decision on wiretapping today, delivered by Justice Lewis F. Powell Jr.:

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 II 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 nations from attempts of domestic organizations to attack and subvert the existing structure of Government." There is no evidence of any involvement, directly or indirectly, of a foreign power.

## The Possible Safeguards

Our present inquiry, though important, is therefore a narrow one. It addresses a question left open by [the case of] *Katz v. United States*:

Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security.

The determination of this question requires the essential Fourth Amendment inquiry into the "reasonableness" of the search and seizure in question and the way in which that "reasonableness" derives content and meaning through reference to the warrant clause.

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Article II, Section 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.

National security cases 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 protect speech.

Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. 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. Senator Hart addressed this dilemma in the floor debate:

"As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government."

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.

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 offices of government as neutral and disinterested

magistrates. Their duty and responsibility is to enforce the laws, to investigate and to prosecute.

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.

## Proper Task for Judges

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.

If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a Court, one may question whether there is probable cause for surveillance.

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.

Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Government itself to provide the necessary clerical assistance.

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. Nor do we think the Government's domestic surveillance powers will be impaired to any significant degree.

By no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.