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# Constitutional Law - Fourth Amendment - Conduct of an Effective Foreign Policy Demands That Presidential Power to Conduct Electronic Surveillance for Foreign Affaris Purposes Not Be Subjected to Warrant Requirement, and That Subsequent Judicial Review Be Limited

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repudiate its decision in *Rosenbloom*. This would again result in uncertainty for both the news media and defamed private individuals.

The significance of the *Gertz* opinion lies in the Court's repudiation of the *Rosenbloom* public or general interest test and in its refusal to extend the *New York Times* standard to cases involving private individuals. Consequently, the status of the individual is once again paramount; the public's interest in a certain issue is of no consequence in determining whether the *Times* standard should apply. The definition of a public official as announced in *New York Times* and elaborated in *Rosenblatt*[109] has been revitalized; a similar result has been obtained with regard to the definition of a public figure as announced in *Butts* and elaborated upon in *Greenbelt*.[110] In future cases, the dispute will focus on whether the defamed plaintiff is a public official, public figure, or private individual. If he is a public official or a public figure, the *Times* standard will still be applied; if he is a private individual, then the state standard of liability will be applied. Although in both situations the burden of proof lies with the plaintiff, the state standard of reasonable care is less rigorous. Therefore, the plaintiff will be able to establish culpability more easily than he would if the actual malice standard had been retained.

While the instant decision is supported by a majority rationale, which eliminates the uncertainty of *Rosenbloom*, it is submitted that the true impact of *Gertz* will only be realized when the states frame their own standards for defamation in the area of individuals who are neither public officials nor public figures. Only when the states have thus responded to the instant case will the law of defamation come to rest.

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CONSTITUTIONAL LAW — FOURTH AMENDMENT — CONDUCT OF AN EFFECTIVE FOREIGN POLICY DEMANDS THAT PRESIDENTIAL POWER TO CONDUCT ELECTRONIC SURVEILLANCE FOR FOREIGN AFFAIRS PURPOSES NOT BE SUBJECTED TO WARRANT REQUIREMENT, AND THAT SUBSEQUENT JUDICIAL REVIEW BE LIMITED.

*United States v. Butenko* (3d Cir. 1974)

Appellant Ivanov and his codefendant Butenko were convicted of conspiracy to commit espionage for attempting to transmit to a foreign government information relating to the defense of the United States,[1] and

109. *See* note 22 *supra*.
110. *See* note 82 *supra*.

1. United States v. Butenko, 494 F.2d 593, 596 (3d Cir. 1974). Defendants were convicted of having conspired to violate the provisions of sections 797 and 951 of the federal criminal code. Section 794 proscribes the acts of espionage.

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates,

unsuccessfully appealed to the Court of Appeals for the Third Circuit.[2] While petitions for certiorari to the Supreme Court of the United States were pending, the Government voluntarily revealed that it had conducted electronic surveillance in which certain conversations of Ivanov had been intercepted.[3] The Supreme Court, having granted certiorari,[4] held that the records of the illegal surveillance must be disclosed to the defendant, and remanded the case for a determination of the legality of the surveillance under the fourth amendment and for findings of whether, if illegal, the surveillance had tainted the convictions.[5]

Upon remand, the district court, following an *in camera* viewing of the surveillance records, found that the challenged set[6] of warrantless interceptions, which had been expressly authorized by the Attorney General,[7] violated neither section 605 of the Communications Act of 1934[8] nor the fourth amendment.[9] On appeal, the Third Circuit, sitting en banc[10]

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delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government . . . either directly or indirectly, any . . . information relating to the national defense, shall be punished . . . .

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

18 U.S.C. § 794(a), (c) (1970).

Section 951 requires all nonemissary foreign agents to register with the Secretary of State.

Whoever, other than a diplomatic or consular officer or attaché, acts in the United States as an agent of a foreign government without prior notification to the Secretary of State, shall be fined . . . or imprisoned . . . .

*Id.* § 951 (1970).

2. United States v. Butenko, 384 F.2d 554 (3d Cir. 1967), *vacated in part and remanded sub. nom.*, Alderman v. United States, 394 U.S. 165 (1969). The Third Circuit, however, directed an acquittal of Ivanov under the section 951 count. *Id.*

3. 494 F.2d at 596.

4. 392 U.S. 923 (1968). The Court's decision to grant certiorari was prompted by this Government disclosure, and the grant was limited to questions of standing and the Government's duty to disclose the records of illegal surveillances. *Id.* at 923–24.

5. Alderman v. United States, 394 U.S. 165 (1969).

6. The Government had conceded that another set of interceptions was illegal. *See* Giordano v. United States, 394 U.S. 310, 313 n.1 (1969). However, this was held not to have tainted the conviction. United States v. Ivanov, 342 F. Supp. 928 (D.N.J. 1972). This surveillance apparently had not been approved by the Attorney General. *Id.* at 932 n.2. *See* note 66 *infra*.

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

8. 47 U.S.C. § 605 (1964), *as amended,* 47 U.S.C. § 605 (1970).

9. 318 F. Supp. at 71–73. The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

The appellant had contended that the warrantless search violated his fourth amendment rights. 318 F. Supp. at 71–72. The court, however, adopted the Government's position that the President, acting through the Attorney General in the exercise of his constitutional power to conduct the nation's foreign policy, could lawfully authorize warrantless electronic surveillance for the purpose of gathering foreign

affirmed the district court by a five-to-four margin, *holding, inter alia,* that, while the fourth amendment is applicable to the executive's foreign affairs power, that amendment does not, in light of the compelling governmental need to gather foreign intelligence, require the executive to obtain a warrant prior to conducting electronic surveillance to secure foreign intelligence information since the opportunity for post-surveillance judicial review adequately safeguards fourth amendment rights. *United States v. Butenko,* 494 F.2d 593 (3d Cir.), *cert. denied,* 419 U.S. 881 (1974).

*Butenko* involved two issues which have historically received markedly different treatment by the courts. While the executive branch has always been subject to rigorous judicial scrutiny when it employs electronic surveillance, the courts have accorded it great latitude in its activities in the field of foreign affairs.

The Supreme Court of the United States has long recognized that the President has the power to hire agents to obtain intelligence information, this power being derived from his authority as Commander in Chief.[11] The Court has stated that this intelligence gathering power is a necessary adjunct to the authority of the Executive, the "sole organ of the federal government in the field of international relations."[12] Its willingness to recognize broad presidential authority over foreign policy has made it unwilling to scrutinize the exercise of this authority. The Court has explicitly stated its policy as follows:

> The 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.[13]

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intelligence information necessary to the national security. 318 F. Supp. at 70–71. *See* text accompanying notes 11 & 12 *infra.*

10. 494 F.2d at 596. At the first hearing, the Third Circuit had unanimously affirmed the district court's finding that the concededly illegal interceptions had not tainted the convictions (*see* note 6 *supra*), but held by a two-to-one vote that the set of interceptions in issue in the instant case had been made in violation of section 605 of the Communications Act of 1934, 47 U.S.C. § 605 (1964), *as amended,* 47 U.S.C. § 605 (1970). 494 F.2d at 597. The panel remanded the case to the district court for the Government's disclosure to Ivanov of the records of this set of interceptions so that an evidentiary hearing might be held to determine whether or not they had prejudiced his conviction. *Id.* The Government petitioned the court for a rehearing en banc of that portion of the decision which had ordered this disclosure and hearing; the court granted this petition. *Id.*

11. Totten v. United States, 92 U.S. 105, 106 (1875). The Constitution provides in part: "[T]he President shall be Commander in Chief of the Army and Navy of the United States . . . ." U.S. CONST. art. II, § 2, cl. 1.

12. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

13. United States v. Belmont, 301 U.S. 324, 328 (1937), *citing* Oetjen v. Central Leather Co., 246 U.S. 297 (1918). The Supreme Court discussed the issue of whether cases involving foreign affairs are political questions, and thus not justiciable, in Baker v. Carr, 369 U.S. 186 (1962) (dictum). The Court there stated that while foreign relations cases are frequently political questions, not every case relating to foreign affairs was a fortiori not justiciable, but that each case should be evaluated separately in terms of its historical management by the political departments, the existence of standards to aid in its judicial decision, and whether or not a decision upon the issue has already been made by the political departments. *Id.* at 211–12. The cases cited

The Court has buttressed this policy by stating that intelligent review of the executive branch's foreign policy actions cannot be conducted unless the Court has access to the secret intelligence information upon which the executive actions are based, and by explicitly holding that it does not consider itself privy to such secret intelligence data.[14]

The Court's reluctance to compel disclosure of this information undoubtedly has stemmed from its policy of protecting the secrecy of the Executive's intelligence gathering efforts.[15] The Court has held that information about intelligence operations "must never be disclosed" in court because such a disclosure "might compromise or embarrass our government in its public duties . . . ." and thus entail a detriment to the public.[16] It has prohibited disclosure even when the result of this prohibition has been to prevent the judiciary from enforcing a strong policy of its own.[17]

Despite its deference to the executive branch, the Court has consistently maintained that the foreign affairs power "must be exercised in subordination to the applicable provisions of the Constitution,"[18] including the restrictions imposed by the Bill of Rights.[19]

In marked contrast to the area of foreign affairs, executive authorization of electronic surveillance has always been subjected to close judicial scrutiny. Section 605 of the Communications Act of 1934[20] prohibited the

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by the Court indicate that except for those arising under the supremacy clause, cases relating to foreign affairs have been deemed justiciable only when no conclusive action has been taken upon them by another governmental branch, or when the Court's task was to determine the applicability of federal statutes to American activity abroad. *Id.* at 212–13. The Court has never reviewed the legality of a foreign affairs decision made by a President. *See id.* at 211–13.

14. Chicago & S. Air Lines v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948). In that case, the Court was asked to review a presidential refusal to grant an overseas air route. *Id.* at 105. The decision upon the route involved questions of national defense and foreign relations. *Id.* at 108. The reasons given for the President's refusal to grant the route were quite vague, the Civil Aeronautics Board saying only that he had made his decision "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility." *Id.* at 111, *quoting* Latin American Air Serv., 6 C.A.B. 857, 860 (1946). Nonetheless, the Court declined to review the decision. 333 U.S. at 109–11.

15. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

16. Totten v. United States, 92 U.S. 105, 106–07 (1875).

17. *See id.* at 107. In the *Totten* case, a spy who had never been paid for the services he had rendered the Union during the Civil War had his suit dismissed due to the Court's fear that it would entail disclosure of intelligence operations, even though the war had ended, and dismissal was clearly contrary to the strong judicial policy against unjust enrichment. *See id.* at 106–07.

18. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

19. *Cf.* Reid v. Covert, 354 U.S. 1 (1957).

20. 47 U.S.C. § 605 (1964), *as amended,* 47 U.S.C. § 605 (1970). The Act reads in relevant part:

> [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . .

*Id.*

The Supreme Court held that this ban of wiretapping applied to federal agents investigating domestic crime, and that neither evidence obtained in violation of

interception and divulgence of communications by any person without the consent of the sender. This statutory rule was supplemented by a constitutional mandate when the Supreme Court held that the use of electronic devices to intercept conversations constituted a "search" within the meaning of the fourth amendment.[21] Shortly thereafter, Congress passed title III of the Omnibus Crime Control and Safe Streets Act of 1968[22] (Crime Control Act), which permitted federal agents to conduct electronic surveillance in certain instances,[23] but contained restraints upon them consistent with the Supreme Court's decision.[24] Congress itself noted, however, that "[l]imitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake,"[25] and surveillance in these areas was, therefore, exempted from the Act's requirements, as well as from the restrictions of the Communications Act of 1934.[26]

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the statute nor the "fruits" thereof could be utilized in court. Nardone v. United States, 308 U.S. 338, 341 (1939); Nardone v. United States, 302 U.S. 379, 382 (1937). President Roosevelt agreed with these decisions, but believed that they still permitted electronic surveillance for internal security and foreign affairs purposes, and ordered such surveillance to continue. Confidential Memorandum from President Roosevevlt to Attorney General Jackson, May 21, 1940, *quoted in* United States v. Smith, 321 F. Supp. 424, 430–31 (C.D. Cal. 1971). *See* United States v. United States District Court, 407 U.S. 297, 310–11 n.10 (1972). Surveillance for foreign affairs purposes has been carried on continuously from the date of this memorandum. United States v. Butenko, 494 F.2d 593, 624 (3d Cir. 1974) (Aldisert, J., dissenting in part).

21. Berger v. New York, 388 U.S. 41, 51, 54–60 (1967). Because electronic eavesdropping constituted a search, the Court held that a state statute which failed to subject it to the same degree of strict judicial scrutiny as was constitutionally required for other types of searches was unconstitutional. *Id.* Nontrespassory surveillances were held to constitute "searches" in Katz v. United States, 389 U.S. 347 (1967).

22. 18 U.S.C. §§ 2510–21 (1970).

23. *Id.* § 2516.

24. *Compare id.* § 2518 *with* Berger v. New York, 388 U.S. 41, 51, 54–60 (1967). The Crime Control Act primarly requires the Attorney General or his designate to apply for a warrant, which will be granted only if there is probable cause to believe that 1) the target of the surveillance will commit or has committed one of a specified list of offenses; 2) information about this offense will be obtained through interception of communications; 3) such interception is the only feasible means of investigation; and 4) the place where the interception is to be made is used, or is about to be used, by the target of the surveillance. 18 U.S.C. § 2518 (1970).

25. S. REP. No. 1097, 90th Cong., 2d Sess. 60 (1968).

26. The Crime Control Act provides in part:

> (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. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding

Since the Crime Control Act did not require a warrant for domestic security surveillance, the Supreme Court, in *United States v. United States District Court*,[27] had to decide whether the fourth amendment imposed this requirement. The Court held that the presidential power to protect national security was subject to the fourth amendment and its warrant requirement because such surveillance posed a danger both to freedom of expression and freedom from unreasonable invasion of privacy.[28] The Government's interest in its ability to operate more efficiently without these restrictions was not considered strong enough to outweigh these dangers.[29] At the same time, the Court emphasized that it expressed no opinion whatsoever as to the constitutionality of warrantless surveillance conducted for foreign affairs purposes.[30]

Since foreign surveillance occurs with much greater frequency than domestic surveillance,[31] and consequently may present a greater threat to fourth amendment rights, the question *Butenko* presented had added significance.

After initially concluding that section 605 of the Communications Act of 1934[32] did not apply to wiretaps employed for foreign intelligence purposes,[33] the Third Circuit focused upon the issues of whether, and to what extent, the fourth amendment limited foreign surveillance activities.[34]

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only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

Crime Control Act § 2511(3), 18 U.S.C. § 2511(3) (1970).

27. 407 U.S. 297 (1972).

28. *Id.* at 313.

29. *Id.* at 317–18, 320–23. The Court held the government interest insufficient because it believed judges were capable of dealing with complex domestic security issues, and because it believed judges could take adequate steps to assure security at the ex parte warrant hearing. *Id.* at 320–21. This rationale appears to run contrary to precedents in the foreign affairs area. *See* text accompanying notes 13, 16 & 17 *supra.*

30. 407 U.S. at 308, 321–22. The Court stated that "foreign surveillance" was surveillance directed at the "'activities of foreign powers, within or without this country,'" while "domestic surveillance" was surveillance "'deemed necessary to protect the nation from attempts of *domestic organizations* to attack and subvert the existing structure of Government.'" *Id.* at 308–09, *quoting* the affidavit of Attorney General Mitchell (emphasis supplied by the Court).

31. Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 HARV. L. REV. 976, 993 n.67 (1974).

32. 47 U.S.C. § 605 (1964), *as amended* 47 U.S.C. § 605 (1970). *See* note 20 *supra.*

33. 494 F.2d at 598–602. The court noted that if section 605 were interpreted to be a congressional proscription of such taps, it would raise a possible issue of unconstitutional congressional restriction of presidential authority to conduct foreign policy. *Id.* at 601. The dissenting opinions filed by Chief Judge Seitz, joined in by Judge Van Dusen and joined in part by Judge Aldisert, 494 F.2d at 608–15, Judge Aldisert, joined by Judge Van Dusen, *id.* at 620–26, and Judge Gibbons, *id.* at 626–34, strongly disagreed with the majority's interpretation of section 605. In fact, this was the primary issue which divided the court, as the dissenters viewed the foreign surveillance under question as violative of § 605, and therefore, except for Judge Gibbons, did not consider the fourth amendment issue. *Id.*

The importance of section 605 was greatly diminished by the passage of the Crime Control Act. *See* notes 25 & 26 and the accompanying text *supra.*

34. 494 F.2d at 602.

The court acknowledged that foreign threats to national security are of "immeasurable gravity," but found nothing either in the President's powers enumerated in article II or in the balance of the Constitution to justify exempting the conduct of foreign affairs, including foreign surveillance, from the protection of the fourth amendment.[35]

The court noted that under the fourth amendment all searches must be "reasonable" — supported by probable cause — and that even a reasonable search may be unlawful if made without a warrant.[36] It then proceeded to analyze the instant case in light of these two requirements.[37] The court first recognized that the warrant requirement may be excused when specific and exigent factual circumstances are present,[38] or when a strong public interest is involved.[39] In the instant case, the court decided that the public interest in a continuous flow of information to the executive branch[40] justified another exception to the warrant requirement when surveillance stemmed from a need for foreign affairs intelligence.[41] In light of the need for the President to act secretly and quickly to investigate espionage, and his frequent inability to anticipate the need to conduct electronic surveillance in doing so,[42] the court concluded that a requirement that federal agents obtain judicial approval prior to conducting such surveillance would seriously interfere with the effectiveness of their operations.[43] Although it conceded that if the warrant requirement were applicable, traditional fourth amendment analysis would nonetheless excuse warrantless surveillance when the exigencies were truly pressing, the court believed that federal agents could be expected neither to distinguish exigent from nonexigent situations, nor to rush to magistrates in the latter cases.[44] The court emphasized that subsequent judicial review would provide an adequate deterrent to executive abuse of the warrant exemption.[45] It expected opportunities for such review to arise primarly through motions to suppress evidence in criminal cases, and, occasionally in civil suits for violation of individual

35. *Id.* at 603. The court stated that this conclusion logically followed from *District Court,* which had held that presidential power to protect internal security was subordinate to the fourth amendment. *Id.*

36. *Id.* at 604.

37. *Id.*

38. *Id.* Such situations include searches of an automobile where there is inadequate opportunity to obtain a warrant, *e.g.,* Carroll v. United States, 267 U.S. 132 (1925); "frisks" of persons stopped for questioning, if they are reasonably believed to be armed and dangerous, Terry v. Ohio, 392 U.S. 1 (1968); and searches incident to lawful arrests, *e.g.,* Chimel v. California, 395 U.S. 752 (1969). 494 F.2d at 604.

39. 494 F.2d at 605. Wyman v. James, 400 U.S. 309 (1971), cited by the court as authority for this statement, involved the applicability of the warrant requirement to home visits by welfare workers. *Id.* at 310, 317–18. *See* text accompanying notes 57–60 *infra.*

40. 494 F.2d at 605.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 606.

rights.[46] The occasion for review having arisen in the instant case, the legality of the warrantless surveillance was tested against a modified standard of probable cause,[47] because the governmental interest which compelled the intrusion was based upon something other than a belief that criminal activity would be uncovered.[48] The Third Circuit held that the fourth amendment would be satisfied if the primary purpose of the surveillance was to secure foreign intelligence information, and that any accumulation of evidence of criminal activity must be purely incidental,[49] so that the foreign intelligence label would not be used as a cloak for domestic political or criminal surveillance.[50] In light of the district court's finding that the surveillance had been conducted *solely* for the purpose of obtaining foreign intelligence information,[51] the Third Circuit held the surveillance was constitutional.[52]

It was undoubtedly proper for the court to give such heavy weight to the needs of the Executive in this case. Unlike most fourth amendment cases, which involve balancing an individual's right to privacy against society's right to protection from suspected criminal activity, this case involved governmental interests of greater scope. Restricting the President's surveillance power could endanger the national security and jeopardize the effectiveness of the nation's foreign policy, with a substantial adverse impact upon the lives of all citizens. While these considerations were present in *District Court,* they were overshadowed by the danger to freedom of expression present there.[53]

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46. *Id.* at 605–06 & n.52. *See* notes 70 & 71 and accompanying text *infra.*

47. *See* text accompanying note 36 *supra.*

48. 494 F.2d at 606.

49. *Id.* at 605.

50. *Id.* Outside of this caveat, the court did not precisely define the scope of the term "foreign intelligence purposes."

51. 318 F. Supp. at 70.

52. 494 F.2d at 606. Since disclosure of surveillances not yet held to be illegal need only be ordered if it would substantially promote a more accurate resolution of the issue raised by the surveillance, the court also held that the trial judge had not abused his discretion by refusing to order disclosure of the records of the wiretaps. *Id.* at 607. The court reasoned that since the appellant had conceded that these surveillances had been conducted solely to gather foreign intelligence information, disclosure of the records of the wiretaps could not further illuminate the resolution of the legal issue presented. It thus concluded that the need for secrecy of information as sensitive as that involved in this case made an in camera examination a proper alternative to full disclosure and an adversary proceeding upon legality. *Id.* The majority never indicated whether the fact that appellant was a Soviet, and not an American citizen, was a factor in its decision. Appellant had argued that the fourth amendment protects aliens as well as citizens. *Id.* at 617–18 (Aldisert, J., dissenting in part). *See* Au Yi Lau v. Imm. & Natur. Serv., 445 F.2d 217, 223 (D.C. Cir.), *cert. denied,* 404 U.S. 864 (1971) (aliens protected by fourth amendment). *See also* Graham v. Richardson, 403 U.S. 365 (1971) (classifications based upon alienage held suspect); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 & n.5 (1953) (aliens protected by fifth amendment).

53. This is because *District Court* involved domestic security surveillance; surveillance within the penumbra of that vague phrase has historically been used by other governments, and could easily be used by this government against outspoken political dissidents. 407 U.S. at 320. While this problem is not entirely absent from the for-

However justified the court may have been in granting substantial weight to these interests, it is submitted that in doing so, the court failed to give full consideration to traditional judicial rules created to assure maximum protection of fourth amendment rights. The Third Circuit stated that the warrant requirement should be excused only in response to a specific and critical fact situation,[54] but the broad scope of the exemption granted in the instant case arguably did not meet these criteria. The exemption encompasses *all* foreign intelligence surveillance and applies even if the information sought is not vital to national security. The exemption also applies if the agents had ample time to obtain a warrant,[55] if the need for secrecy is not overwhelming, and even if the small risk of a security leak involved in an ex parte hearing[56] should have been taken. This sweeping exception does not follow from the strong public interest involved. The court's authority for excusing the requirement in deference to such an interest was *Wyman v. James*,[57] where the Supreme Court refused to apply the fourth amendment warrant requirement to home visits by welfare workers. However, the Court in *Wyman* held that the intrusion in that case had not constituted a "search" within the meaning of the fourth amendment, and only for the purpose of argument did it assume the contrary, holding the intrusion reasonable in any event.[58] Second, in its discussion of reasonableness, the *Wyman* Court emphasized the limited nature of the intrusion involved in a visit made at a reasonable time of the day with several days advance notice having been given,[59] noting that the visits served not only the public interest but the interest of the person visited as well.[60] Electronic surveillance, on the other hand, is an extremely broad intrusion, since all conversations of an unsuspecting individual, regardless of their relevance to the alleged illegal activity,[61] are monitored for a considerable period of time, serving only governmental interests.

It is normally the judiciary's role to scrutinize such serious invasions of individual privacy. However, in the instant case, this role conflicted with the judiciary's concomitant duty to exercise restraint in its review of executive decisions concerning foreign affairs. Although faced with having to choose which role to follow, the court did not expressly weigh the

eign surveillance area (*see* notes 71, 90 & 91 and accompanying text *infra*), use of the surveillance power against domestic political dissenters would be much more difficult to justify in terms of *external* threats to security.

54. *See* text accompanying notes 38–39 *supra*.

55. 494 F.2d at 637 (Gibbons, J., dissenting). Judge Gibbons, in his dissenting opinion, criticized the majority's failure to consider this factor and the element of presence or absence of a special need for secrecy in determining whether the warrant requirement should be excused in the instant case. *Id.*

56. The Supreme Court in *District Court* noted that security risks would not be as great at the ex parte warrant hearing. 407 U.S. at 320–21. *See* note 29 *supra*.

57. 400 U.S. 309 (1971). *See* note 39 and accompanying text *supra*.

58. 400 U.S. at 318.

59. *Id.* at 320–21.

60. *Id.* at 319–20.

61. United States v. Smith, 321 F. Supp. 424, 429 (C.D. Cal. 1971).

competing interests supporting each one. Its final holding[62] clearly implied that it chose the role of judicial restraint; yet its failure to express this choice and the reasons for it is puzzling.

The court seemed to rest its decision upon the inconveniences involved in applying the warrant requirement to foreign intelligence surveillance.[63] However, these inconveniences might not be as great as the court perceived them to be. The court admitted that under traditional analysis, the warrant requirement, even if originally applicable, could be relaxed for exigent circumstances in the area of foreign surveillance.[64] As Judge Gibbons' dissent noted, the test for determining whether such sufficient exigencies are present could be altered to meet the specific problems which arise in this area by considering the unusually important governmental interest involved and the frequent unforeseeability of the need for foreign intelligence surveillance.[65] The court's analysis ignored the fact that, as a necessary adjunct to the protection of fourth amendment rights, the courts have traditionally required government officials to distinguish "exigent" from "nonexigent" circumstances, and to always obtain judicial approval in the latter cases.[66] It should also be noted that since the planning and execution of electronic surveillance usually requires some time, a warrant application could be made during the planning period.[67] Finally, problems of time and security could be minimized by directing all applications to a centralized

62. *See* text accompanying notes 43 & 49 *supra.*

63. *See* text accompanying notes 42–44 *supra.*

64. *See* text accompanying note 44 *supra.*

65. 494 F.2d at 636 (Gibbons, J., dissenting).

66. *E.g.,* Sibron v. New York, 392 U.S. 40, 64–66 (1968); Berger v. New York, 388 U.S. 41, 68 (1967); Warden v. Hayden, 387 U.S. 294, 298–99 (1967); Schmerber v. California, 384 U.S. 757, 770 (1966); McDonald v. United States, 335 U.S. 451, 455–56 (1948); Johnson v. United States, 333 U.S. 10, 15 (1948).

Additionally, the Government only argued in favor of having the Attorney General, acting as the President's agent, authorize foreign surveillance without prior judicial approval. *See* note 9 *supra.* Indeed, in nearly all of the previous cases in which this issue had arisen, the surveillance had been authorized by the Attorney General. *See* United States v. Clay, 430 F.2d 165, 166 (5th Cir. 1970), *rev'd on other grounds,* 403 U.S. 698 (1971); Zweibon v. Mitchell, 363 F. Supp. 936, 938–42 (D.D.C. 1973), *rev'd and remanded,* 516 F.2d 594 (D.C. Cir. 1975); United States v. Hoffman, 334 F. Supp. 504, 506 (D.D.C. 1971); United States v. Brown, 317 F. Supp. 531, 535 (E.D. La. 1970); United States v. Stone, 305 F. Supp. 75, 78 (D.D.C. 1969). In the only case in which the surveillance had not been authorized by the Attorney General, the Government conceded it to have been conducted illegally. Giordano v. United States, 394 U.S. 310, 313 n.1 (1969). *See* note 6 *supra.* In spite of this, the court's language in *Butenko* indicated that it assumed that decisions to conduct a surveillance would be left to officers of lower rank:

> Certainly occasions arise when officers acting under the President's authority are seeking foreign intelligence information, where exigent circumstances would excuse a warrant. To demand that such officers be so sensitive to the nuances of complex situations that they must interrupt their activities and rush to the nearest available magistrate to seek a warrant would seriously fetter the Executive .... 494 F.2d at 605.

If the court actually made this assumption, it was not justified by the record. If it did not, it is submitted that a demand that the Attorney General of the United States be "sensitive to the nuances of complex situations" is not unreasonable.

67. Note, *supra* note 31, at 981.

court dealing only in this area, all employees thereof having security clearance.[68]

The court's argument that judicial sanctions imposed via post-invasion review would deter abuse of the warrant exemption[69] is not convincing. Civil suits were mentioned as a possible sanction for violation of fourth amendment rights,[70] but the problem with relying upon this as a deterrent is that since the subject of electronic surveillance is nearly always unaware of the existence of such surveillance, he seldom becomes aware of any possible violation of his constitutional rights. Even in the event that the subject subsequently learns of the surveillance, it would seem unlikely that one would want to call attention to himself by filing a civil suit.[71]

The deterrent effect of the judicial sanction in criminal cases in which electronic surveillance has been unlawfully used seems to be greater than that represented by civil suits. Once the surveillance was determined to have been illegal, the records would have to be disclosed to the defendant, and, if it were later determined that any of the evidence to be offered at trial were the fruit of such surveillance, that evidence would be excluded.[72] The disclosure requirement is particularly severe, because it would force the government to detail its surveillance operations to its adversaries, regardless of whether the illegal surveillance actually tainted the government's case or even had any relation to the prosecution at hand.[73] However, the fact that these sanctions arise only in criminal cases sharply diminishes their effectiveness as a deterrent, since most surveillance in the foreign affairs area is aimed at intelligence gathering rather than criminal prosecution.[74]

Despite clear precedent that only objective probable cause, and not subjective good faith, will satisfy the requirement of "reasonableness,"[75]

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68. United States v. United States District Court, 407 U.S. 297, 323 (1972); 494 F.2d at 636 (Gibbons, J., dissenting in part).

69. *See* text accompanying notes 45 & 46 *supra.*

70. 494 F.2d at 600 n.23. Such suits have been permitted since the ruling of the Supreme Court in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

71. Suits would be more likely to arise if abuse were flagrant, or if the subject of surveillance is an outspoken political organization. *See, e.g.,* Zweibon v. Mitchell, 363 F. Supp. 936, 938–42 (D.D.C. 1973), *rev'd and remanded,* 516 F.2d 594 (D.C. Cir. 1975), (member of Jewish Defense League who were subjected to surveillance because of their anti-Soviet activities sued the Attorney General, who had ordered the surveillance).

72. Alderman v. United States, 394 U.S. 165 (1969).

73. *Developments in the Law — The National Security Interest and Civil Liberties,* 85 HARV. L. REV. 1130, 1254 (1972) [hereinafter cited as NATIONAL SECURITY].

74. It should be noted, however, that taps for foreign intelligence purposes have had an unusual propensity for incidentally intercepting conversations of persons later subjected to criminal prosecutions. Despite the fact that the prosecutions have been unrelated to the taps and untainted by them, the disclosure sanction became available. *See, e.g.,* United States v. Clay, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds,* 403 U.S. 698 (1971). The Government's awareness of the possible occurrence of this undersirable result could have an additional deterrent effect. Note, *supra* note 31, at 989.

75. *See, e.g.,* Beck v. Ohio, 379 U.S. 89, 97 (1964).

the instant opinion implied that the good faith belief of the agent that he could obtain foreign intelligence information would suffice, if that were his primary purpose.[76] The court reached this result in spite of the fact that the rationale behind the standard of objective probable cause clearly extends to the area of foreign surveillance: "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of [government officers]."[77]

By emphasizing that its own standard will effectively prohibit warrantless surveillance undertaken primarily for investigating domestic criminal and political activities,[78] the court implicitly assumed that this type of "bad faith" abuse is one which predominates. However, traditionally, the greatest abuse in the fourth amendment area has come from overzealous agents invading the privacy of others in good faith but without objective probable cause.[79] In addition, the court ignored the fact that government agents acting in good faith have shown a tendency to enlarge permissible invasions beyond their otherwise justifiable scopes.[80] This is another type of abuse against which the court's standard of judicial review will provide no protection.[81]

It would appear that the most convincing reason for the relaxation of traditional fourth amendment safeguards in this area is that the concept of judicial incompetence in evaluating foreign policy considerations forbids anything more stringent. Requiring the judiciary to consider factors which judges must always evaluate in domestic criminal cases[82] would necessitate a

76. *See* text accompanying notes 49–50 *supra.*

77. Beck v. Ohio, 379 U.S. 89, 97 (1964), *quoting* U.S. CONST. amend. IV. One can easily imagine how the pressure to obtain important foreign intelligence information would influence the executive to overlook the evils of invading privacy, and, instead, order electronic surveillance even when the possibility that the surveillance would uncover the necessary information was slim. *See* United States v. United States District Court, 407 U.S. 297, 317 (1972).

78. *See* note 50 and accompanying text *supra.*

79. The following are examples of cases in which official conduct appeared to be in good faith, but was held illegal because of insufficient justification: Spinelli v. United States, 393 U.S. 410, 412–14 (1969); Sibron v. New York, 392 U.S. 40, 64–66 (1968); Beck v. Ohio, 379 U.S. 89, 96–97 (1964); Henry v. United States, 361 U.S. 98, 102–04 (1959); State v. Elkins, 245 Ore. 279, 281–84, 422 P.2d 250, 252–54 (1966).

80. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 445–48, 469–71 (1971); Chimel v. California, 395 U.S. 752, 753–55 (1969); Sibron v. New York, 392 U.S. 40, 64–66 (1968); State v. Elkins, 245 Ore. 279, 280–83, 422 P.2d 250, 252–54 (1966). *See also* Berger v. New York, 388 U.S. 41, 57–61 (1967).

81. Yet, if one could assume that it is the "bad faith" abuse which predominates in the cases which the court would encounter in the area of foreign surveillance, the court's test would prove adequate to protect individual rights most of the time, assuming also that one could rebut an agent's protestations of good faith. In support of such an assumption, one could argue that foreign surveillance undertaken in good faith will rarely uncover evidence of purely domestic crimes (*but see* note 74 *supra*), and civil suits would only be brought following flagrant violations which result from "bad faith."

82. *See* Berger v. New York, 388 U.S. 41 (1967); Crime Control Act § 2518, 18 U.S.C. § 2518 (1970). These factors include the likelihood that the surveillance will uncover the desired information, the importance of the information, the possi-

judicial evaluation of, at least to some degree, the foreign policy needs of the United States, the nature of the intelligence activities of other countries, and the nature of sources of foreign intelligence information.[83] These are areas in which a judicial inquiry has always been avoided, because it was thought to be beyond judicial power to make one.[84] By contrast, executive evaluation of these areas has been an accomplished fact for 200 years, and the resulting expertise should receive judicial deference. Thus, once a court were to determine that the primary purpose of the surveillance was to gather foreign intelligence, its inquiry would be at an end, as any further scrutiny would be beyond the limits of judicial power and competence.

If the Third Circuit's reason for imposing a relaxed standard of review was its awareness of its own incompetence to conduct a stricter one, perhaps a reason for its refusal to apply the warrant requirement was its recognition of its own impotence as a mechanism for the enforcement of that requirement. Because the judicial sanctions used to prevent abuse arise only in civil suits and criminal cases, and are of a limited scope,[85] it is conceivable that even had the court applied the warrant requirement to foreign surveillance, the Executive might freely have violated that ruling[86] and continued to order surveillance entirely upon its own, knowing that in the great majority of cases its violations would never be subjected to judicial review. If this be true, the practical effect of the court's failure to adopt the warrant requirement is slight. Yet the possibility of the revelation of such conduct, giving rise to potent political sanctions (for example, a strong adverse reaction from the electorate and its representatives), would act as a formidable deterrent;[87] therefore, the practical effect of this decision would be to eliminate the potential political sanction, leaving only the enforcement of the weaker legal standard suggested by the court.[88]

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bility that the information could be obtained without electronic surveillance, *see* Note, *supra* note 31, at 997, the possible excuse of a warrant application by the specific exigencies of a case (*see* text accompanying note 64 *supra*), and the proper scope of the surveillance. 494 F.2d at 636 (Gibbons, J., dissenting); Note, *supra* note 31, at 997.

83. The exact factors would vary in each case, depending upon whether the surveillance was designed to obtain information about other nations or merely to detect and frustrate foreign espionage activities directed against the United States. Either situation would involve an evaluation of factors outside of the traditional judicial function.

84. *See* notes 13 & 14 and accompanying text *supra.*

85. *See* text accompanying notes 69–74 *supra.*

86. *See* 494 F.2d at 636 (Gibbons, J., dissenting in part); *National Security, supra* note 73, at 1260; Note, *supra* note 31, at 989.

87. Note, *supra* note 31, at 989–90. There can be little doubt that if Congress and the public were to learn that the Executive had been deliberately and systematically violating the constitutional rights of individuals (as those rights would be defined by a more stringent test of the legality of foreign intelligence surveillances), the public outcry would be great, political embarassment severe, the President's chances for reelection damaged, the fortunes of his political party harmed, and, possibly, congressional investigations initiated. *See* NEWSWEEK, Aug. 12, 1974 at 24–27, 29.

88. Another possible reason for the court's decision may be a concern that a contrary holding might constitute a judicial "foot in the door" leading to greater judicial review of executive decisions upon other foreign policy questions where

A further difficulty with *Butenko* involves the failure of the court to set the parameters of its decision by defining the phrase "foreign intelligence purposes."[89] The vagueness of this phrase lends itself to expansive construction and could lead to judicially condoned surveillance of individuals and organizations which have only a tangential relationship to the conduct of foreign affairs.[90] The court did not indicate how substantial the relationship must be to justify the "foreign surveillance" label and exemption from the warrant requirement.[91] Future courts will thus have to shape the definition of the phrase on a case-by-case basis. However, since the facts surrounding the surveillance must almost always be kept secret and the determination of legality made *in camera,*[92] the judicial opinion upon whether the "primary purpose" test is met must go unsupported by the expression of specific facts and justifications, and no real body of case law will result.[93] The court, therefore, should have defined "foreign intelligence purposes," although it may have been technically unnecessary to the decision, so that the Third Circuit courts might have an acknowledged, uniform standard to apply.[94]

The court stated that it was attempting to strike a balance between the federal government's need to accumulate foreign intelligence and the people's right to privacy.[95] By striking this balance in favor of the Government, the court showed a willingness to relinquish to a significant degree its role as guarantor of individual rights in order to allow the President to maintain his traditionally free hand in the field of foreign affairs.

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precedents do not clearly forbid it. While it might be argued that the court erred in the other direction by opening a gap in the protection of individual rights, the exception to the warrant requirement created in the instant decision can never be expanded, because it is limited by statute and judicial precedent which require prior judicial approval of all other electronic surveillance. *See* notes 21–24 and accompanying text *supra.* The area to which the exception is restricted is quite narrow; in 1972, at the time of the *District Court* decision, there were only 27 foreign intelligence surveillances being conducted in the United States. Note, *supra* note 31, at 993 n.67.

89. *See* note 50 and accompanying text *supra.*

90. United States v. United States District Court, 407 U.S. 297, 309 n.8 (1972); S. REP. No. 1097, 90th Cong., 2d Sess. 94 (1968); Note, *supra* note 31, at 987. In United States v. Hoffman, 334 F. Supp. 504 (D.D.C. 1971), the Government argued that "any attempt to legally distinguish the impact of foreign affairs from matters of internal subversive activities is an exercise in futility." *Id.* at 506. The court responded that "in view of the important individual rights protected by the Fourth Amendment, any such difficulty . . . should be resolved in favor of interposing the prior warrant requirement." *Id.* at 506–07.

91. For instance, how would the court classify the tapping of the phones of international oil companies to gain intelligence on their dealings with the Arab nations? 494 F.2d at 628 (Gibbons, J., dissenting in part). *But see* 494 F.2d at 603 n.37.

92. *See* note 52 *supra.*

93. Note, *supra* note 31, at 996.

94. *Id.*

95. 494 F.2d at 596.