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Wiretapping--Power of United States Attorney General to Authorize Wiretapping Without Judicial Sanction

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and efficient manner, once a rational basis for divorce law is established.

> Under medieval law there was a kind of rough-and-tumble justice by ordeal in which the parties stood with their arms crossed over their breasts and the one who endured the longer was declared the winner. We are still too close to this kind of justice in our divorce cases. Alimony will never be an easy problem to solve, but we can help both husbands and wives by bringing our alimony customs up to date.[51]

George A. Smith

WIRETAPPING—POWER OF UNITED STATES ATTORNEY-GENERAL TO AUTHORIZE WIRETAPPING WITHOUT JUDICIAL SANCTION.—The Federal Constitution has established, in the Bills of Rights, certain precious and delicate freedoms which are the heritage of every citizen of the United States. The founders of this country have entrusted the duty of interpreting the scope of these rights solely to the judiciary. Being in the ostensibly objective position of arbiter, the judiciary must define the nature of each of these personal protections. Perhaps the most sensitive of these delicate freedoms is the freedom from unreasonable searches and seizures guaranteed by the fourth amendment. Conflicts have arisen where a government official in a more or less subjective position has attempted to define the extent of this freedom. The United States Court of Appeals for the Sixth Circuit faced this very problem in *United States v. United States District Court for the Eastern District of Michigan, Southern Division.*[1]

The defendants in this case were indicted for conspiring to commit the destruction and depredation of government property.[2] Before the

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[51] Hofstadter and Herzog, *supra* note 6, at 70.

[1] No. 71-1105 (6th Cir. April 8, 1971).

[2] The defendants were indicted under 18 U.S.C. § 371 (1964) and 18 U.S.C. § 1361 (1964). The pertinent part of section 371 reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 1361 reads:

> Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:
> If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than 10 years, or both;

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trial the defendants filed a motion for disclosure of certain wiretapping evidence that had been procured by the government, and the motion was granted by the United States District Court for the Eastern District of Michigan, Southern Division. The United States then filed a petition for a writ of mandamus asking that the district court's order be set aside. In support of its position the government attached an affidavit signed by Attorney-General John Mitchell, stating that the wiretaps involved were "expressly approved" by him in his capacity as Attorney-General and as agent of the President, and that "it would prejudice the national interest to disclose the particular facts surrounding these surveillances, other than to the court *in camera.*" The Sixth Circuit Court of Appeals denied the petition for a writ of mandamus and upheld the district court's order, thus rejecting this broad assertion of power by the Attorney-General.

The problems created by wiretapping and its infringement of the personal privacy of individuals are not so new that they lack a substantial historical background. The first widespread use of wiretaps by law enforcement officers coincided with the rise of organized crime during Prohibition. However, fear of security leaks during World War One caused Congress to place an absolute ban on wiretapping.[3] After that war the use of wiretaps by the Justice Department was resumed until prohibited by Attorney-General Stone in 1924. Such a policy continued until 1931, when Attorney-General W. D. Mitchell renewed the practice, citing the disadvantages faced by the government in fighting organized crime without the aid of wiretaps.[4] Perhaps giving rise to this policy shift was the Supreme Court's decision in *Olmstead v. United States.*[5] In that case, a five-man majority of the Court ruled that since wiretaps used by Treasury agents investigating a suspected bootlegger did not physically invade the defendant's premises, nor result in any physical seizure of tangible objects, the taps did not constitute a fourth amendment search and seizure, and therefore the wiretap evidence was admissible. Thus arose the premise that the fourth amendment protects *places,* not *people.* This thesis re-

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if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

One defendant, Plamondon, was alleged to have destroyed government property worth more than $100.

[3] Westin, *The Wire Tapping Problem: An Analysis and A Legislative Proposal,* 52 COLUM. L. REV. 165, 172 (1952); Act of October 29, 1918, ch. 197, § 1, 40 Stat. 1017.

[4] Brownell, *The Public Security and Wire Tapping,* 39 CORNELL L.Q. 195, 196 (1954).

[5] 277 U.S. 438 (1928).

mained the guiding judicial principle in eavesdropping cases for nearly forty years.[6]

In Section 605 of the Federal Communications Act of 1934,[7] Congress apparently banned wiretaps once again. The statute said that no one, without the sender's authorization, could "intercept any communication and divulge or publish the existence, contents, or substance" of such communication "to any person." This wording, of course, created speculation about whether or not agents *could* "intercept" communications as long as they did not "divulge" them.[8] This speculation did not end, even after the Supreme Court's first confrontation with Section 605 in the case of *Nardone v. United States*.[9] There it was held that no wiretap evidence could be used as testimony in the federal courts, even when introduced by federal agents. However, the court did not definitely say whether such information might be subject to interception as long as it was not used as evidence. The case was remanded to the district court. Later, upon *writ of certiorari, Nardone* was again before the Supreme Court and testimony regarding the "fruits" of such wiretaps was also excluded.[10]

But wiretapping by federal agents did not end; instead, it received a new impetus. The early use of wiretaps was justified as being necessary to combat domestic crime. With the advent of World War Two and the Cold War, this rationale began to change and the protection of "national security" against international threats became the major justification for government eavesdropping.[11]

In *Olmstead* the Supreme Court had held the exclusionary rule applied only to violations of the Constitution, not to statutory violations.[12] The Court returned to this concept in *Goldstein v. United States*[13] to avoid the effect of Section 605 and the *Nardone* cases.[14] As a result, evidence obtained in violation of Section 605 was admissible as long as the defendant's *personal rights* were not violated. Thus, when evidence used against a defendant was obtained in violation of a third party's rights, such evidence could be used in court. On the

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[6] Spritzer, *Electronic Surveillance By Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 170 (1969). *See generally* Karabian, *The Case Against Wiretapping*, 1 PACIFIC L.J. 133 (1970).

[7] 47 U.S.C. § 605 (1964).

[8] Brownell, *supra* note 4, at 197.

[9] 302 U.S. 379 (1937). The Court emphasized the fact that the crucial issue was the "divulgence" and made no reference to the specific question of "interpretation."

[10] Nardone v. United States, 308 U.S. 338 (1939).

[11] Brownell, *supra* note 4, at 198.

[12] 277 U.S. 438, 465 (1928).

[13] 316 U.S. 114 (1942).

[14] *See* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 211 (1966).

same day *Goldstein* was decided, the Court, in *Goldman v. United States*,[15] held that listening from an adjoining room to the defendant speaking into a telephone receiver did not violate Section 605. Speaking for the majority, Justice Roberts stated: "The protection intended and afforded by the statute [Section 605] is of the means of communication and not of the secrecy of the conversation."[16] These two cases severely limited the thrust of Section 605. It was not until 1957, in *Benanti v. United States*,[17] that the Supreme Court began returning to the liberal stance it had assumed in the late 1930's. In that case the Court said that Section 605 "[R]equired a more stringent exclusionary rule in wiretapping cases than was required by the fourth amendment in search cases."[18] Speaking for the Court, Chief Justice Warren noted: "Section 605 contains an express, absolute prohibition against the divulgence of intercepted communications."[19] But despite the *Benanti* decision, several courts continued to issue wiretap orders,[20] and, prior to the Supreme Court's decision in *Katz v. United States*,[21] the federal government continued to hold the *Olmstead* view "that electronic surveillance was unlawful only when accomplished by a trespass."[22] In *Katz*, the Court finally overturned *Olmstead* and ruled that the fourth amendment protected *people*, not *places*.[23] However, in *Katz* the Court also said that electronic devices could be used to invade an individual's privacy, as long as the approval of a magistrate was obtained in advance. The question which remained unanswered in *Katz* was whether the President, or his agent, could lawfully authorize a wiretap without judicial intervention to protect the national security.[24] The Supreme Court has yet to resolve this question. In the present case the Sixth Circuit considered only half of the issue, that involving *domestic* threats to the nation's security. The other side of

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[15] 316 U.S. 129 (1942).
[16] *Id.* at 133.
[17] 355 U.S. 96 (1957).
[18] Landynski, *supra* note 14, at 214.
[19] 355 U.S. 96, 102 (1957).
[20] See Landynski, *supra* note 14, at 217, where the author quotes a New York legislative report issued in 1959:

> The Berente decision has been on the books since 1957, but it has never been implemented. Except as noted, law enforcement wiretapping has proceeded in New York as before. *Id.*, at 217, note 80.

[21] 389 U.S. 347 (1967).
[22] Spritzer, *supra* note 6, at 193 n. 120.
[23] 389 U.S. 347 (1967). The court affirmatively stated:

> But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" defeats attention from the problem presented by this case. For the Fourth Amendment protects people not places." *Id.* at 351.

[24] 389 U.S. 347, 358 n. 23 (1967).

the coin, executive authority for wiretaps in cases involving foreign security threats, was not considered.

There have been several recent cases wherein the Supreme Court has stopped immediately short of answering the crucial question that was met by the Sixth Circuit in the case at hand. A situation similar to the one in the present case came before the Supreme Court in *Ivanov v. United States*.[25] In *Ivanov* the issue was whether or not the government had to fully disclose evidence it had obtained by illegally eavesdropping on the defendants. In his brief for the government, the Solicitor General did not contend that evidence obtained through electronic eavesdropping was admissible in a criminal trial, even during a national security investigation. Instead, the government claimed that the interceptions were irrelevant to the charges and urged that the trial judge examine them *in camera* to determine the irrelevance. It is interesting to note that the same procedure was desired by the government in the present case. In *Ivanov* the Supreme Court rejected that procedure, declaring that the defendant was entitled to a full disclosure of any evidence obtained through any illegal surveillance which has taken place.[26] Unfortunately *Ivanov*, like *Katz*, failed to answer the question of the Attorney-General's power to authorize wiretaps in national security cases.

The subsequent case of *Taglianetti v. United States*[27] likewise granted the defendant a considerable degree of latitude for discovery. In that case the Supreme Court ruled that "the defendant was entitled to see a transcript of his own conversations and nothing else."[28] The Sixth Circuit in the present case mentioned the *Taglianetti* decision and specifically noted the government's concession that the defendant's own conversation was the entire substance of the wire taps at issue.[29]

In July of 1970 the Fifth Circuit Court of Appeals, in *United States v. Clay*,[30] held that "[T]he defendant had no right to see records or logs of conversations to which he was not a party. . . . ,"[31] and declared

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[25] 394 U.S. 165 (1969).
[26] Spritzer, *supra* note 6, at 199.
[27] 394 U.S. 316 (1969).
[28] *Id.* at 317.
[29] United States v. United States District Court for the Eastern District of Michigan, Southern Division, No. 71-1105 (6th Cir. April 8, 1971), where the court stated:

> Thus the Supreme Court held that all illegally intercepted conversations of a defendant must be made available to him, but that the District Judge may *in camera* ascertain which transcripts are covered by this ruling. Of course, in this case we have no problem concerning standing. The government concedes that Plamondon's [a defendant] own voice was intercepted and recorded and the District Judge and this court have held the interception to have been illegal. *Id.* at 30.

[30] 430 F.2d 165 (5th Cir. 1970), *cert. granted* 400 U.S. 990 (1971).
[31] *Id.* at 169.

that to allow him to do so "[w]ould be contrary to the national interest, [these conversations] having been obtained in foreign intelligence surveillance."[32] The Supreme Court granted *certiorari,* but not on the relevant fourth amendment issues.[33] In the present case, the Sixth Circuit pointed out that the Fifth Circuit in *Clay* squarely held that the *foreign* intelligence surveillance was not unconstitutional and that the Supreme Court refused to review the question. Therefore the court felt the only question remaining was whether or not electronic domestic surveillance was unconstitutional. The Sixth Circuit decided that no domestic threat to the nation's security can justify a wiretap obtained without judicial intervention.

Having remained within the traditional bounds of judicial *stare decisis,* the court still had a legislative roadblock to avoid. Did the wiretapping provisions of the Omnibus Crime Control and Safe Streets Act of 1968[34] make wiretaps like the one at issue legal? The Sixth Circuit, by confining itself to the single issue of whether or not the President has the power to authorize wiretaps in cases involving domestic security problems, held that the present case was not covered by the Act. In its argument the government relied on Section 2511 (3) of that act which deals with the President's power to authorize wiretaps when the country's security is menaced by a foreign power.[35] However, this section says nothing about security problems arising from within the United States. The defendants in the present case were all citizens of the United States, and the acts for which they were indicted allegedly occurred within the boundaries of this nation. The court noted that nowhere in the wording of Section 2511 (3) is there authority for the wiretaps used in this case. Had the government followed the emergency no-warrant procedure provided by Section

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[32] *Id.* at 171.

[33] United States v. Clay, 430 F.2d 165 (5th Cir. 1970). The Supreme Court reversed the Fifth Circuit Court of Appeals solely on the issue of whether or not petitioner's claim of a conscientious objector draft status had been erroneously denied him.

[34] 18 U.S.C. § 2516 (1) (a-g) (Supp. V. 1965-69); 18 U.S.C. § 2518 (7) (Supp. V, 1965-69); 18 U.S.C. § 2511 (3) (Supp. V, 1965-69).

[35] The pertinent provisions of § 2511(3) provide:

> Nothing contained in this chapter or in 605 of the Communication's 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 overt action 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.

2518 (7) of the Act, which makes no distinction between foreign and domestic "conspiratorial activities,"[36] the Sixth Circuit might have had to consider the validity of the Crime Control Act. But since the government ignored that provision and chose to act in a more precipitous fashion, using the Presidential authority as a cloak, the court had no trouble in ruling that the Omnibus Crime Control and Safe Streets Act was not controlling in the present case. The Sixth Circuit's decision in this case did not run afoul of the letter of the statute, however much some might feel it conflicted with the spirit of the Act;[37] and the court's narrow decision prevented it from considering what others feel are "serious constitutional infirmities"[38] of the Crime Control Act.

In a narrow, precise opinion the Sixth Circuit Court of Appeals has ruled that the executive branch of the government has no power to authorize wiretaps, without judicial sanction, even to protect the national security from domestic threats. This question, one "of first impression" at the appellate level,[39] has yet to be resolved by the

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[36] The pertinent language of § 2518(7) reads:

> 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 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, may intercept such wire or oral communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. . . .

[37] Judge Weick, in his dissent in the present case, cites the Senate Report of the Omnibus Crime Control Act, specifically referring to the Presidential powers envisioned by the Senate as a result of 18 U.S.C. § 2511 (3) (Supp. V, 1965-69).

The Senate Report reads:

> To assure the privacy of oral and wire communications, title 3 [the wiretapping provisions of the Omnibus Crime Control Act] prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified types of serious crimes, and only after authorization of a court order obtained after a showing and finding of probable cause. The only exceptions to the above prohibition are: (1) the power of the President to obtain information by such means as he may deem necessary to protect the Nation from attack or hostile acts of a foreign power, to obtain intelligence information essential to the Nation's security, and to protect the internal security of the United States from those who advocate its overthrow by force or other unlawful means. 1968 U.S.C.C. and A.N. 2153.

[38] Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 460 (1969).

[39] The Court noted four District Court cases in which arose the issue presented in the instant case. United States v. Dellinger, Criminal No. 69-180 (U.S.D.C. N.D. Ill. E.D.) decided February 20, 1970, and United States v. O'Neal, Criminal KC-CR 1204 (U.S.D.C. D. Kansas) decided September 1, 1970, resulted in favorable decisions for the government. United States v. Smith, Criminal No.

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Supreme Court. However, if the Supreme Court does decide to rule on this case, the question remains as to what will be the basis of its holdings. It may continue to expound on such nebulous concepts as "national security," thereby circumventing the basic issue involved, or it may weigh the dangers of ignoring the constitutional doctrine of separation of powers against the possibility of discovering isolated plots to destroy government property. If the Court selects the former choice, the issue may never be settled; it will forever be at the mercy of executive or judicial whim. If the Court should choose the latter course, however, it would at least have an opportunity to establish a concrete and definable standard. In considering the issue, the Court, will be faced with a serious question: What is the Attorney-General of the United States? Is he an objective arbiter, sturdy in the position of complete neutrality, attempting to balance personal rights secured by the Bill of Rights against the overall fear of ultimate harm? Above all, does the United States Constitution give him the power he is attempting to assume? Since its inception this country has adamantly adhered to the doctrine of separation of powers. It is not the function of the executive branch to interpret the Constitution and laws of the United States. Furthermore, it is not the function of the Attorney-General to permit the invasion of an individual's fourth amendment rights of privacy based solely on *his* interpretation of the Constitution. The Attorney-General is responsible for prosecuting violations of federal law. He has the ultimate responsibility for all government litigation that reaches the Supreme Court. These are enforcement, not interpretive, functions. To operate most fairly and efficiently, each branch of our government must be limited to its precise intended responsibility. Permitting the executive branch of the government to attach its own interpretation to the fourth amendment by "expressly approv[ing]" electronic surveillance without prior judicial scrutiny would frustrate the intended doctrine of separation of powers.

Perhaps there are certain instances where prior judicial approval must be foregone and unauthorized action by federal agents is justifiable. However, the broad concept of "national interest" must be viewed with restraint and very carefully applied. If the Supreme Court is to give the Attorney-General subjective power in this area, it should do so with strict qualification. The personal freedoms promulgated in the Bill of Rights are too important to entrust their protection to any but the most discriminating and objective.

Patrick A. Thompson

4277 (U.S.D.C. C.D. California) decided January 6, 1971, and the present case, resulted in adverse rulings for the government.