Department of Justice

"WIRETAPPING AND OUR NATIONAL SECURITY"

AN ADDRESS OF

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BEFORE THE

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You have all, I am sure, heard and read a great deal in the past few months about one of the most controversial legal issues of recent times--that of national security wiretapping without a warrant. Because it involves the right to privacy, which all Americans cherish highly, and which this Government is dedicated to protect, the subject is fraught with deep emotional overtones.

The controversy has raged, both in the courts and in the press, and will continue to do so until the Supreme Court speaks to the issue. I would like to explore this issue with you, in hopes of dispelling some of the misconceptions that have arisen.

At the outset, let us consider the stakes involved in the Government's use of electronic surveillance in national security cases. Our success in counteracting hostile intelligence forces and domestic revolutionary elements depends on our ability to learn what they are doing. A key factor in accomplishing this has been the selective use of wiretapping.

The value of wiretapping in combatting foreign-directed espionage and subversion is widely recognized; it has been an integral part of the counter intelligence program of every major country.

The threat to our society from so-called "domestic" subversion is as serious as any threat from abroad. Never in our history has this country been confronted with so many revolutionary elements determined to destroy by force the Government and the society it stands for. These "domestic" forces are idealogically and in many instances directly connected with foreign interests.

In a speech on electronic surveillance Lewis F. Powell, Jr.--one of the nation's most distinguished attorneys and a former president of the American Bar Association--had this to say:

> The distinction between external and internal threats to the security of our country is far less meaningful now that radical organizations openly advocate violence. Freedom can be as irrevocably lost from revolution as from foreign attack.

In recent times, this nation has witnessed ever-increasing numbers of acts of sabotage. In August 1970, a bomb exploded in Sterling Hall at the Madison campus of the University of Wisconsin, killing one individual and causing damages estimated at three million dollars. The wave of terrorist bombings reached a climax with the brazen bombing of the U. S. Capitol early this year. These are not isolated incidents. According to statistics of the National Bomb Data Center, in the ten-month period from July 1, 1970 to May 1, 1971, there were 1,378 bombings in this country--the vast majority of which were related to sabotage of the Nation's military efforts. In these bombings, 106 people were injured and 14 people were killed.

The selective use of wiretapping has been a vital part of the United States Government's defense against subversion for the last three decades. It has led to identification of hostile intelligence officers and their contacts and agents in the United States, disclosure of potential or actual defectors among U. S. nationals, detailed information concerning the modus operandi and intelligence methods of hostile agents, and exposure of connections between "domestic" subversive groups and foreign interests.

The argument for national security wiretapping does not rest on necessity alone; it has a very firm legal basis. It is this legal basis that I would like to emphasize in my remarks today.

In this Nation, the Government is constituted by the people and charged with the responsibility, in the words of the Preamble to the Constitution: "to insure the domestic Tranquility, promote the general Welfare, and secure the Blessings of Liberty." Overthrow of this Government by force and violence would be utterly inconsistent with the peaceful means for change provided by the Framers, and would deny to each citizen these securities to which he is entitled.

The Constitution designates the President as the Chief Executive and obligates him to "preserve, protect, and defend the Constitution of the United States!" When the President enters upon his office, Article II, Section 1 of the Constitution requires him to solemnly swear that he will fulfill this obligation. This oath obviously does not refer to the defense of a piece of paper, but to the defense of the actual operation of the Constitution in prescribing the guidelines of Government. Were the President to permit the overthrow of that Government by unconstitutional means, he would be violating his constitutional oath. Nor does the President's oath differentiate between foreign and domestic enemies, requiring him to protect the Constitution against one but not against the other.

The Constitution of the United States cannot possibly be construed as containing provisions inconsistent with its own survival. It is the charter for a viable governmental system--not a suicide pact. Thus, a Presidential decision as to the steps to take in averting a clear and present danger to the national security cannot and should not wait until actual attack, sabotage, or insurrection have occurred.

Accordingly, the President has an obligation to collect, in advance and on a continuing basis, whatever information is reasonable and necessary for present and future decisions in using the forces at his command. No less can be expected of him if he is faithfully and dutifully to exercise his constitutionally imposed responsibility to protect the national security.

Persons intent on using illegal means to change or alter our form of Government do so covertly, and information as to their activities often can be obtained only in a covert fashion. Wiretapping has proven to be an effective method for obtaining such information.

The wiretapping question has been evolving in the courts for many years, and has been presented in various forms. Generally, these cases can be reduced to two prototypes: (1) wiretapping to obtain evidence in the enforcement of penal statutes, and (2) wiretapping to provide necessary intelligence information on a continuing basis to assist the President in discharging his duty to assure and preserve the national security.

In its landmark decision in Katz v. United States, rendered in 1967, the Supreme Court held for the first time that a wiretap initiated for prosecutive purposes in a criminal case constituted a search and seizure within the meaning of the Fourth Amendment. The Fourth Amendment does not proscribe all searches and seizures, but only those which are found to be unreasonable. Consequently, if it meets this test of reasonableness, wiretapping is a permissible governmental tool.

The Department of Justice has recognized that, when prosecutive information in a criminal case is sought, electronic surveillance--like most searches and seizures--requires a prior judicial warrant. In the litigation currently evolving in the courts, the Government has taken the position that the reasonableness standard of the Fourth Amendment is a flexible one and does not require in all cases that a warrant be obtained. It is our position that compelling considerations exist when the President, acting through the Attorney General, has determined that a particular surveillance is necessary to protect the national security and that under these circumstances the warrant requirement does not apply.

It should be recognized that the Supreme Court has repeatedly held that under exceptional circumstances searches are reasonable though no warrant has been obtained. We believe that national security surveillance is of an exceptional nature and falls within this limited category. Pertinent here is the Court's explicit recognition in another case that "in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration." The Supreme Court has never passed on the question whether "national security" surveillance is reasonable when conducted without a warrant, but Justice White, concurring in Katz, has written:

> We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

The Congress has recognized that national security cases involve such compelling considerations. In response to the Katz decision, Congress enacted detailed wiretapping legislation in the Omnibus Crime Control, and Safe Streets Act of 1968. In that legislation, the Congress specifically set forth the standards that

govern the granting of warrants for electronic surveillance in criminal cases. The Congress, however, carefully avoided imposing the warrant requirement in national security cases by including a provision in the statute which explicitly recognizes the President's authority to conduct such surveillances.

It is our position, given the long-standing practice of the Executive and the Congressional recognition of the necessity for distinguishing between wiretapping in ordinary criminal cases and in national security cases, that warrantless national security surveillances are reasonable within the meaning of the Fourth Amendment.

We have not argued against the need to get authorization for such a wiretap. Instead, we maintain that in national security cases the authorization required by the Constitution is that of the President of the United States, acting through his Attorney General, rather than that of a local magistrate.

It is not claimed that the President is exempt from the provisions of the Fourth Amendment, or that his discretion is unbridled. For any abuses of the power, the President is answerable not only to the

electorate from whom all his powers are ultimately derived, but his decisions may also be reviewed by the courts in appropriate in camera proceedings. We simply say that the President's authorization of electronic surveillance for gathering intelligence in national security cases meets the requirement of reasonableness in the Fourth Amendment.

There are sound reasons for confining the authority to order electronic surveillance in national security cases to the President rather than to a multitude of lower court judges. The nature of the sensitive information involved in national security cases is not susceptible to evaluation by persons untrained in national security matters or to wide dissemination to persons not authorized by law to receive such information. Only the President is in a position to evaluate adequately such information in the light of various intelligence data submitted by the independent agencies within the intelligence community. We submit that the President, by virtue of his office and sources of information, is in a far better position than any magistrate to determine the need to initiate surveillance where the national security is at stake.

But if the authority to issue a warrant in national security cases is to be vested in magistrates only, the United States is left essentially with two options:

(1) To make disclosure to any one or more of over 600 members of the Federal judiciary who in most instances cannot be expected to have the necessary background to analyze the significance of the information disclosed or the necessity for the intelligence sought, or

(2) To become the only nation in the world unable to engage effectively in a wide area of counter-intelligence activities necessary to the national security.

These alternatives do not adequately protect the interests of privacy or of the security of citizens of the United States. Neither alternative, we submit, is acceptable and the Constitution does not require that we accept them.

It has been argued that the President might abuse his power to authorize national security wiretapping. This is put forward to challenge the "reasonableness" of a Presidential authorization, under

the Fourth Amendment, and to insist that such authorization be made by the judiciary. Yet the courts that have questioned the constitutionality of the Presidential authorization on this ground are showing a remarkable inconsistency, which I will explain.

In 1803 the U. S. Supreme Court asserted its power to declare an act of Congress unconstitutional in the case of Marbury v. Madison. Chief Justice John Marshall emphasized that a Federal judge is required by his oath of office to discharge his duties "agreeably to the Constitution and laws of the United States." How could he do this, Marshall asked, if the Constitution "is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."

In challenging the President's power to authorize national security wiretapping, the Sixth Circuit Court of Appeals reasserted

the power of the courts to make such judgments of constitutionality, drawing heavily on the Marbury v. Madison opinion. Yet the very argument of the courts' obligations under oath made in Marbury v. Madison must apply as well to the President's obligations under his oath--the more so since his oath is prescribed in specific words in the Constitution, while the judiciary's oath is not. The President's oath obligates him to "preserve, protect, and defend" the Constitution and the U. S. Government. To deny the President the means of obtaining intelligence on which to base actions in defense of that Government would be to deny him powers essential to the discharge of his oath. If this is the real state of things, to borrow Marshall's words, "this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime."

Since electronic surveillance is an effective means of gathering intelligence in national security cases, and is used by all major countries for such purposes, the President would be derelict if he did not use it where necessary and appropriate in defense of the constitutional Government.

Thus to claim that the President might abuse this power is the same as claiming that there should be no office with such power--an obviously self-defeating proposition. It is the same as arguing that the courts might abuse the power of constitutional review that Chief Justice Marshall found implicit in his oath. Such an argument was effectively answered not only in Marshall's Marbury v. Madison opinion, but also a number of years earlier by Alexander Hamilton, who wrote that "if it prove anything, would prove that there ought to be no judges."

Are we, then, to trust the courts to fulfill their oath of office without abusing it, but not trust the President in fulfilling his oath? Clearly the hard questions of government must be decided by someone. To withhold such basic powers from the President on the ground that they might be abused is to argue, in a paraphrase of Hamilton's words, "that there ought to be no President."

Finally, the distinction to which I alluded earlier--that between wiretapping in criminal cases and wiretapping in national security situations--is not the one that some lower Federal courts have today chosen to draw. Rather, they attempt to justify a distinction between so-called "foreign" national security wiretapping and so-called "domestic" national security wiretapping.

The use of the terms "foreign" and "domestic intelligence" and "foreign" and "domestic organizations" has resulted in a great deal of confusion and has created a dichotomy, which cannot be supported in law or fact. There is no dividing line between hostile foreign forces seeking to undermine our internal security and hostile "domestic groups" seeking the overthrow of our Government by any means necessary. I don't see how we can separate the two, but if it were possible, I would say that history has shown greater danger from the domestic variety.

As a legal proposition, what difference is there between the threat posed to the security of the United States by those who act as agents of a foreign power and that posed by an allegedly "domestic" organization? The Constitution requires the President to swear that he will "preserve, protect, and defend the Constitution of the United States." It does not say that he will "preserve, protect, and defend" it only against foreign agents, and that he must permit all others to destroy it if they will. It makes no distinction in its charge of responsibility to the President, and he can make none in his sworn

duty to carry out that charge. You cannot separate foreign from domestic threats to the Government and say that we should meet one less decisively than the other. Either we have a constitutional Government that can defend itself against illegal attack, or in the last analysis we have anarchy. I firmly believe that the Constitution does not contain the seeds of its own destruction. Rather, it provides an enlightened basis by which man can prove that he can maintain both his freedom and his Government.