UNCONSTITUTIONAL SURVEILLANCE & UNITED STATES V. UNITED STATES DISTRICT COURT: WHO THE WINNER IS MAY BE A SECRET – PART 2

[Given the current surveillance state situation in America, the Keith case, formally known as United States v. United States District Court, is one of the most important cases from our recent past. But I don't really believe you can understand or know the law of a case, without really understanding the facts. The Keith case doesn't have simple facts, but they are fascinating and instructive. So bear with me – this is going to take awhile, and will be laid out over a series of four posts. In Part I we went into the background, predicate facts and surrounding circumstances of the Keith case. Today in Part 2 we will discuss the actual court goings on in more detail. – Mary]

District Court Judges Deal with the Mitchell Doctrine in *Smith* & *Sinclair.*

Before we can get to the actual Keith case, where the DOJ filed a mandamus against Judge Keith, we have to look at what Judge Keith did with the DOJ arguments in the Sinclair case. In his Memorandum Opinion, Judge Keith summarized the DOJ's position:

> The position of the Government in this matter, simply stated, is that the electronic monitoring of defendant Plamondon's conversations was lawful in spite of the fact that the surveillance was initiated and conducted without a judicial warrant. In support of this

> position, the Government contends that the United States Attorney General, as agent of the President, has the constitutional power to authorize electronic surveillance without a court warrant in the interest of national security.

Judge Keith then went on to list several cases, one from the Fifth Circuit and two others from District Courts in Kansas and Illinois, respectively, where the government had been successful in a similar argument.

However, not every case had gone DOJ's way and Judge Keith chose to focus on "the exceptionally well-reasoned and thorough opinion of the Honorable Judge Warren Ferguson of the Central District of California. *United States v. Smith*, 321 F. Supp. 424 (C.D.Cal.1971)." Judge Ferguson bucked the Mitchell Doctrine in very clear and even prescient terms. The opinion isn't long and it's well worth the read. Judge Ferguson deals very swiftly with the Omnibus Act argument and moves on to the Fourth Amendment issues, finding that whatever exceptions you may and may not find in a statute, they do not create an exemption from the application of the Constitution.

DOJ argued (and its an argument that those involved in illegal surveillance still mouth today, largely unchallenged) that the Fourth Amendment isn't really about interposing independent magistrates and warrants, it's about … being reasonable. DOJ argued that the Executive branch only had to be reasonable in its surveillance and that they can best decide, based on all the complex issues of national security, if they've been reasonable. Judge Ferguson, quoting from a prior Supreme Court case, exposed that this argument would mean that the Fourth Amendment evaporates.

Interestingly, the Smith case also delves pretty deeply into another of the DOJ's argument (again, one that persists today) that the

warrantless wiretaps were legal because *everyone else did it too.* It makes for very interesting reading and attaches prior Presidential directives on warrantless wiretapping.

Beyond dealing with the Mitchell Doctrine Judge Ferguson had the insight and foresight to identify the problems presented by the inability of the courts to punish illegal Executive action other than by the Exclusionary Rule and also by the fact that under the DOJ's, there was nothing that required the President to delegate this warrantless wiretap authority to the Attorney General. Rather than a delegation to the highest law enforcement officer of the nation who was required to specifically designate each person for surveillance, Judge Ferguson worried that under the DOJ's argument the President could, instead, delegate such warrantless wiretap power to anyone and they could target without particularity. Judge Ferguson didn't specifically mention night supervisors at the NSA or a massive program where the Attorney General turns the NSA loose to allow massive interceptions at the options of low level NSA operatives — interceptions without individual authorizations and without even an ability for the Attorney General to track, in filings to a secret court, who has been illegally surveilled. But he knew what men do with no oversight and no checks — he knew who Haydens were and what they would do.

But back to Judge Keith's case. After invoking a striking image, the "uninvited ear" Judge Keith goes on to side with Judge Ferguson and make his own indelible contribution.

> In this turbulent time of unrest, it is often difficult for the established and contented members of our society to tolerate, much less try to understand, the contemporary challenges to our existing form of government. If democracy as we know it, and as our forefathers established it, is to stand,

> then “attempts of domestic organizations to attack and subvert the existing structure of the Government” (see affidavit of Attorney General), cannot be, in and of themselves, a crime.

The DOJ Files Against Judge Keith

Rather than complying with Judge Keith’s order, the DOJ insisted it was right and would not turn over the information. It was not at a juncture where it could appeal, so it filed a mandamus action against Judge Keith, asking superior courts to order that the Judge turn over the surveillance logs and not disclose them to the defendants. A mandamus action exists when an officer or lower court is refusing to do something where it has a clear duty. Here, DOJ was claiming that the clear duty was to return the logs to DOJ and not disclose them (we’ll come back to this — but this is the state’s secret aspect of the Keith case).

Now, the Executive branch had used its prosecutorial power to make Judge Keith a defendant and it looked to the Sixth Circuit to rein in the District Court Judge. The Sixth Circuit, however, sided with Judge Keith. The scene was set for a truly remarkable case to be heard by the Supreme Court.

DOJ Searches for a Good Argument While the Supreme Court Takes the Case.

Now that the DOJ was going before the Supreme Court, it had several difficulties — one of the foremost being just what argument it really wanted to sell hardest to the Court. It wanted to argue that of course the President could do “anything” when national security was involved, but it didn’t really want to argue forthrightly that the President was exempt from law. Except, it was willing to make that argument if it had to — but it didn’t want to have to. All of which made for a curious dance leading up to the filings and oral argument in the case.

The Supreme Court had two new members when the

case went up, Justices Rehnquist and Powell. Justice Rehnquist (who had been working on the surveillance case briefs from the DOJ's Office of Legal Counsel) recused. Justice Powell, though, was largely seen as being a "win" for the Government's case, having written aggressively in favor of the Executive's power in national security settings. And since the lower courts and Justice Powell had both seemed favorably inclined to find that there was power to wiretap foreign powers, DOJ tried to pull in foreign power aspects to the case as well.

As reported in March 6, 1972 Time article titled, " *The Law: Turmoil on Taps*"

> The tap was perfectly legal, [DOJ] said, even though it had been installed without a judicial warrant, because warrants are not necessary in cases involving a threat to "national security." This is true not only for the traditional danger from a foreign power, the Justice Department maintains, but also for the security threat posed by the current radical protest movement.
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> …
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> In his argument to the Supreme Court last week, U.S. Solicitor General Erwin Griswold (sic) insisted that radical protests within the U.S. are "interrelated" with security threats from abroad. The Government was merely gathering intelligence to protect the nation, he said, not deliberately seeking evidence for criminal prosecutions. If each case had to be submitted to a judge to get a warrant, Griswold added, "the Government would have to disclose sensitive and highly secret information." Judges, he said, are not as qualified as the Attorney General to make the "subtle inferences" involved. Even though the Attorney General might abuse his power, that "is

> not a valid basis for denying [him] the authority." emph added

The Time's article reference to Griswold, above, is incorrect. The Solicitor General , a former Harvard law dean (but otherwise unlike an Elena Kagan) actually refused to argue the case although his name was on the briefs. Not having a Paul Clement available, Robert C. Mardian was asssigned to handle the arguments. So, while no one knew it at the time, both the Attorney General (Mitchell) who authorized the illegal taps and the deputy Solicitor General, Mardian, who argued the case to the court, would later become indicted in matters relating to the Watergate wiretaping, a case made possibly only by the appointment of an actual, independent prosecutor (something the Bush and Obama DOJs have shunned).

The Supreme Court Rules.

After Mardian's oral argument, the DOJ was less enthused with their prospects for success and they had a right to be. The Justices were beginning to align in two camps, but neither camp gave DOJ the win. At least one Justice was inclined towards a very limited decision, one that would focus on the Omnibus Act and merely find that the Reynold's type affidavit (we'll get to that later) offered by the DOJ and Mitchell was insufficent under the Omnibus Act's requirements – in other words, that a "national security" argument from the government could be trumped by … bad drafting. That Justice, though, was Justice White (who ended up issuing a separate concurrence on this theory), **not** Justice Powell. In the other camp, to the surprise of many, was newly appointed Justice Powell.

The same Powell who had argued for government powers of surveillance before coming to the court (and is thought of as the father of the think tank approach to corporate activism to shape legislation) was now being given the assignment of writing the opinion for the

majority of the court, a court that agreed 8-0 that the DOJ could not order the District Court Judge to return evidence in the case, with only a split on how narrowly they would issue their opinion. The Powell opinion took Madrian's argument that the Attorney General (much less night supervisors on an NSA shift) was better qualifed than the courts to determine if and when the Fourth Amendment should apply and stood it on its uninvited ear.

With respect to the Omnibus Act argument, Powell wrote:

> At most, this is an implicit recognition that the President does have certain powers in the specified areas.
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> …Rather than stating that warrantless presidential uses of electronic surveillance "shall not be unlawful" and thus employing the standard language of exception, subsection (3) merely disclaims any intention to "limit the constitutional power of the President."
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> …In view of these … carefully specified conditions, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act.

Now on to the DOJ's Mitchell Doctrine argument. Powell restricts the decision to not include a case where there had been authorized surveillance leaving open, in part, what might be required to be turned over if the surveillance had been legal (ed. although cases such as Jencks and Brady presumably would still have application in such a case, especially since Jencks, too, involved DOJ arguments of

"national security") and also leaving open the issue of whether surveillance involving a foreign power for foreign intelligence would have been legal. With those caveats, he went on to deal with the Mitchell Doctrine for surveillance of US "dissidents."

> History abundantly documents the tendency of Government — however benevolent and benign its motives — to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. … The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

Pointing out that the warrant clause of the Fourth Amendment is not "dead language" Powell dismisses the argument that the Executive branch is only required to be subjectively "reasonable" and recites a long history of cases finding that the Fourth Amendment is not intended to be entrusted to an Executive's secret and subjective decision of reasonableness. Despite the pragmatic force lent to the government's arguments by bombed out buildings and civil unrest, Powell found that the President's role with respect to domestic security has to be

exercised within the bounds of the Fourth Amendment.

> Thus, we conclude that the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance. Although some added burden will be imposed upon the Attorney General, this inconvenience is justified in a free society to protect constitutional values. Nor do we think the Government's domestic surveillance powers will be impaired to any significant degree. A prior warrant establishes presumptive validity of the surveillance and will minimize the burden of justification in post-surveillance judicial review. By no means of least importance will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur.
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> As the surveillance of Plamondon's conversations was unlawful, because conducted without prior judicial approval, the courts below correctly held that *Alderman v. United States*, 394 U.S. 165 (1969), is controlling and that it requires disclosure to the accused of his own impermissibly intercepted conversations. As stated in Alderman, "the trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect."

So now we have some of the picture that was partly completed with the Keith case. Uncertainty as to what is intended on the domestic v. foreign intelligence front, uncertainty as to delegation powers of the President, some certainty as to domestic groups or persons and even "intelligence" surveillance

of such groups. There is a rule for full (not limited by relevancy) revelation of illegally obtained information to a criminally accused. How does that apply to a capriciously, or even "reasonably" detained person who has not had pre- or post- detention due process or to a militarily detained person "on a battlefield" that is argued to include the United States, even though courts are open and operating here? How does it apply to innocent Americans who were granted civil enforcement rights under FISA and yet were routinely subjected to warrantless, non-particularized, surveillance and storage of their personal information?

Many of the unanswered questions are, after all, questions the Supreme Court would just as soon not have to answer, if for no reason other than the one pointed out by Judge Ferguson – that no matter what egregious government behavior the court is faced with, the courts have little power to remedy that situation. I would argue, though, that there is more power than Judge Ferguson had available to him. After the Church commission findings that many peaceful Americans and journalists and even politicians were wiretapped, the Foreign Intelligence Surveillance Act was passed. FISA put limits on the government's ability to claim that it had legally engaged in foreign surveillance, requires oversight by a court – even if it is a secret court, and recognized the problems with relying on the same prosecutors who were violating the law to prosecute themselves or their superiors by creating a direct action by citizens against the illegal and uninvited ears.

To date, no court has allowed any American citizen to avail themselves of the FISA civil penalties in connection with the massive warrantless government programs, despite the fact that those penalties written specifically to address the problem Judge Ferguson pointed out and to allow for a remedy when the Executive runs amok. One reason they have not done so is that they have consistently agreed that

petitioner in a case under FISA could not have access to the very information that the Keith case required to be made available to defendants in the criminal cases there. And they have denied such access based on the same kind of Reynolds affidavit that even Justice White found insufficient in a case, such as the Keith case, where there was a statutory scheme that made non-compliant government action criminal .

These aspects of the Keith case (or at least my take on these being aspects) – the Reynolds affidavit, Justice White's concurrence in the Keith case, duties of the Federal intelligence Surveillance Court under Alderman, and the FISA civil penalties overlay – those may have to wait for a part III. ;)