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Supreme Court of the United States

In the Matter of:

Igor A. Ivanov, Petitioner, v. United States of America, Respondent	Docket No. 11

Place Washington, D. C.

Date October 14, 1968

ALDERSON REPORTING COMPANY, INC.

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Washington, D. C.

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C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

Igor A. Ivanov,

Petitioner,

v. No. 11

United States of America,

Respondent.

Washington, D. C.
Monday, October 14, 1968

The above-entitled matter came on for agrument at 11:30 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

EDWARD BENNETT WILLIAMS, Esq.,
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Washington, D. C.

Counsel for Petitioner

ERWIN N. GRISWOLD, Esq.
Solicitor General
Washington, D. C.

Counsel for Respondent

MR. CHEIF JUSTICE WARREN: We will now call No. 11, Igor A. Ivanov, petitioner, versus the United States.

Mr. Williams, you may continue.

MR. WILLIAMS: Mr. Chief Justice, may it please the Court, petitioner Igor Ivanov, a citizen of the Sovient Union, an employee of Amtorg Trading Company stands convicted of a conspiracy to commit espionage against the United States under Title 18, United States Code, Section 794. His conviction was affirmed by the United States Court of Appeals of the Third Circuit. A petition of certiorari was filed here. Without detailing the intermediate pleadings between the filing of the petition for certiorari and this oral argument, suffice it to say that pursuant to the order in the Kolod case, the Government conceded that certiorari should be granted, that there should be a remand to the District Court for an in camera ex parte hearing with respect to electronic surveillance conducted in this case.

In the brief filed in this Court in Ivanov, the Government says that conversations of each of the petitioners in these cases were overheard by the use of electronic surveillance equipment and footnoted is this statement, "In some of the instances, the installation had been specifically approved by the then Attorney General. In others the equipment was installed under a broader grant of authority to the FBI, in effect at that time, which did not require specific

authorization."

Experience would indicate to us, I submit, that that is a concession of both wiretapping and eavesdropping in this case.

This case is significantly different from the case just argued at bar because the Government seriously avers in this case that there is a National security consideration to be weighed in the balance of competing and social interests.

I think it is equally significant, if the Court please, if I may say so at the outset of the agrument, that the Government by that reason does not ask for different treatment between Alderman and Ivanov. It asks for precisely the same treatment. It asks for in camera ex parte proceedings with respect to the logs, electronic logs, memoranda and records of the electronic surveillance in each.

Now, first of all, it is our position, if the Court please, that the Fourth Amendment to the Constitution does not make a division among the various kinds of crime. It does not draw a line of demarcation, and the founding fathers, when the Constitution was written and when the American Bill of Rights were forged, understood quite clearly that there is a difference in the various types of crime.

They gave recognition to this in Article 3, Section 3, of the Constitution when they defined treason, and they prescribed the quantum and quality of proof necessary for a

for a treason conviction, but they didn't make any exception in the Fourth Amendment with respect to spy catchers or subversive hunters.

It is next our position, if the Court please, if the Attorney General of the United States certifies to the Court that there is a National security consideration which should excuse the United States from making a disclosure with respect to the nature, the time, the place or the fruits of an electronic surveillance illegally conducted, we say he should be excused provided he consents to a dismissal of the prosecution under the time-honored prinicple of Coplon against the United States, which was decided in 1950, in an opinion by Judge Learned Hand, which was foursquare with the facts in the case at Bar, there was electronic surveillance, an espionage case, an alleged spy, a convicted spy, and the premise was articulated that there the Government had a choice of making a full disclosure to the defendant for the vindication of her constitutional rights or dismissing it. The Government dismissed.

Now, that case, and I think it is significant to note, has stood unassailed by the Government for 18 years until argument was heard in this case last Term. That case was simply a repetition of the doctrine articulated also by the Second Circuit in the United States against Andolschek. So, if the Court please, it is reduced to essence that the concept

of National security should not be the talisman for a pro tanto suspension of due process of law or of any of the rights guaranteed to an accused in a criminal case.

If, in the conduct of relationships between governments in our time, it has become the custom or it has become a necessity to engage in wiretapping or eavesdropping or dissembling or purloining or burglarizing or even killing.

It is not our argument in this Court today that the Executive Branch should be manacled or impeded or harassed in the conduct of relationships with other governments. It is our argument here today that at least the Federal Courts should be a sanctuary in the jungle, and that these morals and mores should not be imported into the American Judiciary System, and that the fruits of this kind of conduct should not become evidence in a criminal case brought by the sovereign power against an accused, nor should these derived from these kinds of conduct be available to the prosecutor in a criminal case brought by the sovereign power.

In essence, as I understand the Government's position in this case, it is asserting its right to be let alone and to that we say Amen, so long as the evidence is not offered in a Federal criminal proceeding.

Q That is not quite the issue, unless I misunderstood, Mr. Williams. The issue is how should it be determined whether the evidence is being offered or the fruits of the unlawfully

obtained evidence is being offered.

Perhaps I misunderstand, but I thought the Governments position was not to depend on the use of such evidence, but that the Government's position was to insist that whether such evidence is being used and the fruits thereof are being used, should be determined by the Judge in camera. Am I wrong about that?

A I think that is the Government's position. The Government's position is the same in this case as it is in the Alderman case, and we say just as it is impossible for this kind of determination to be made in the Alderman case, it is equally impossible for this kind of determination to be made in camera ex parte by the Judge even though the issue may affect National security.

But the Government has argued in its brief at great lengths that we are seeking to impede the Government in assuring the National security, and I say that we are not.

I say that we are not asking that any rules be fashioned to impede or harass the Government in the conduct of its affairs with other governments, or in the conduct of its duty to preserve the National security.

We are asking for a much narrower rule. We are asking that this kind of evidence not be offered in Court, and we are saying that the same rules should pertain to this kind of evidence as pertains with respect to any other kind of

evidence, that there should be a disclosure. A disclosure may be made under Rule 16 as the disclosure may be made as in any other kind of case to eliminate unnecessary dissemination of the information.

So, our position, if the Court please, is that the defendant has the right to disclosure under appropriate protective orders, and he has the right to disclosure to his counsel under appropriate protective orders, regardless of what the nature of the information may be and regardless of whether or not it is contended by the Government that it affects National Security, unless the Government is willing to dismiss the prosecution in which case we agree that it should be excused.

Q You don't mean the Government is saying even if in Alderman's disclosure to the defense, protective orders to take care of the problem were held to be in that kind of case sufficient -- You don't mean to say that nevertheless in a National security case there are other considerations of a National security case which argue for the in camera situation? You don't believe the Government is making that distinction?

A I don't read them as making that distinction, sir. I read them as asking for the same kind of proceeding in each case.

Q They are, but you do not read it as saying even if we loose out in Alderman, nevertheless there are elements in

in the National security case which justify an in camera proceeding?

A I don't read it that way. They may contend it orally. I read them as asking for the same kind of hearing, and I read them as saying the protective orders can be fashioned here just as in the Alderman case. If we are driven to the unhappy conclusion that the alleged spy goes free, then I think we can draw some consolation from the history of the last three decades; that in the three decades of recorded Federal jurisprudence,. during which there were three wars, we have only one instance of an averred spy going free in this frame of reference, and she was the defendant in the case to which I alluded, the Coplon case, and I think we can also get a measure of consulation from the fact that of all of the crimes in jurisprudence, the amount of recidivism takes place in the area of espionage he is by and large defused.

Q Weren't there two others involved in that case?

A Yes, sir, there are two petitioners in this case.

Q Were there not involved in this whole episode others?

A There were three others who were Soviet nationalists who had status enough to go back to the Soviet Union with out blessing.

Now, Your Honor, with respect to the problems that this Court has propounded on standing in this case, and the Court has propounded some hard questions with respect to the

subject of standing in this case, for the purposes of standing, we do contend in capsulized form that a person aggrieved within the purview of Rule 41 is one against whom the illicit search is directed, whether he is known or unknown at the time.

We say, for purposes of standing, that the concept must be considered under the Rule describing an aggrieved person. We say, if the Court please, it must be considered against the background of an age in which electronic surveillance has become a widespread investigative technique, and we must consider in the light of the philosophical rationale for the Federal exclusionary rule.

Now, the rationale of the Federal exclusionary rule has been articulated many times by many courts as being simply that the courts recoil at the philosphic concept that the end justify the means in the administration of criminal justice, that the exclusionary rule is designed to discourage it and affect compliance with the acts of the sovereign power with the law.

It is our position that the rule on standing for which the Government contends is archaic and that it is ineffective against this background. During the early evolution of cases under the Fourth Amendment, by and large we were concerned with cases where the defendant's constitutional rights had been invaded by virtue of the search of his premises, and of seizure of his papers and his effect, so that in the great

majority of cases there was not a serious problem of standing, but we have passed that era and we now have an era where electronic surveillance is used in the following manner, as illustrated in many ways in our papers.

The Government does not listen to the suspect. It does not invade his premises electronically by planting an electronic bug there. Rather, in a very careful, selective manner, it listens to the conversations of his relatives and friends and associates and it invades the premises of his relatives and friends and associates, and it gathers criminal intelligence by this fact, which it indexes and computerizes and makes dossiersuntil such time as it has by utilizing these leads developed a situation where in an indictment can be secured by the presentation of some of this evidence, a Grand Jury, and subsequently a conviction, can be obtained by the use of the same evidence.

And, the suspect, the defendant is left without a remedy because the Government contends he has not been victimized because he was not heard and because no premises in which he had a proprietary interest was invaded.

I suggest to the Court that the Government's position on standing in this case with respect to electronic surveillance is like Solomon's approach to the baby. "Cut it in half," says the Government. There are two competing social interests: (1) that the culprit should not go free. Society has a major interest

in this.

The other is that there should be a deterrence in illegal methods of law enforcement. The Government's proposal would satisfy neither competing social interests.

Why? Because it says that a selected class of culprits should go free -- those who fall within their concept of the term standing, but, on the other hand, the green light should be flashed for a continuation of illicit electronic surveillance because this kind of activity can remain tremendously fruitful and beneficial in the gathering of criminal intelligence without giving the ultimate victim a status to object.

Now, we say, if the Court please, that the time has come for standing to be given vis-a-vis electronic surveillance to the following:

1. To those whose conversations are illicitly listened to, and the Government does not gainsay this.

2. To those persons whose premises are illegally invaded by electronic eavesdropping equipment, and as I read the Government's brief, at page 21, in the Alderman case it clearly does not gainsay this because as I previously read to the Court, the Government says it adheres to the position that a defendant, though not a participant, if the overhearing occurred on premises owned by him or in which he had some interest he has a standing.

Now, I suggest to the Court that one who is the subject matter of an overhearing illegal in nature must have standing if illicit electronic surveillance is to be deterred by Federal agencies.

Finally --

Q The subject matter of the conversation and so forth?

A Yes, sir, and finally, I say this and this sounds very much like a simplistic approach to the problem and I assure the Court that it is not a simplistic approach to the problem. I assure you that consideration has been given to all of the social and legal interests in making the statement.

I believe that standing must be given to a co-defendant in a criminal case whether he be named as a co conspirator or not. I say this first of all because it is hard to conceive that defendants can be joined in a criminal case in the Federal Courts under Rule 8, which provides for joinder of defendants unless there be what could have been averred to a conspiracy.

Why? Because the Rule provides that they must have been engaged in an act or a series of acts or transaction or series of transactions constituting an offense.

Q Suppose he is a defendant being separately prosecuted in connection with the same tranactions and he is not a co-defendant?

A That is why we are driven, Your Honor, in order to avoid this kind of circumvention, to say that the overall

position of the defendant is that he has standing if the search was a search directly against him.

Q So, you don't want us to understand your statement as a category precluding you from suggesting its expansion at a later date?

A I don't want, if the Court please, for anyone to do by indirection that which is inhibiting directly. If the prosecutor, by the simple device of not joining two persons in the same prosecution, could subvert the proper concept of standing, then I would be opposed to that. Thatis why I suggest, Your Honor, as an umbrella under which to gather all of the kinds of electronic surveillance, the fruits of which should be excluded, the rule that a person aggrieved within Rule 41 is a person against whom the electronic surveillance was directed.

We all know that when an electronic surveillance is directed against a person, it is not only against him but it is against those engaged in the illicit enterprise with him whether identified or unidentified at the time.

When there is a monitoring, the Government is not just interested in what it hears about "X", it wants to know about his business associates and friends and acquaintances.

Q You don't go so far as to suggest that all rules of standards in this area should be abolished and the interest and deterrence of illegal enforcement activity should lead us

to say that the Government never uses anything that it has obtained. You don't go that far.

A In this case I don't have to go that far.

Q Where do you stop short?

A I believe in People versus Martin, which was decided by the Supreme Court of California, is a proper ruling. It has been adopted by California. That abolishes all illegal evidence because I do not believe the Court lends itself to illegal conduct on the part of the prosecution.

Q Where are the rules you suggest?

A I am not asking the Court in this hearing to adopt that rule. I am asking this Court to adopt a rule which is something short of that but which I believe --

Q How far short of it?

A But I believe it will be an adequate determination to illegal eavesdropping.

Q How far short of it?

A It is this far short, Your Honor, that before a defendant could come in and compel the kind of disclosure that we are talking about in this proceeding here this morning, he would either have to have been the participant in a conversation which was invaded or he would have to have been the owner or occupant or have a proprietary interest in premises which were invaded, or he himself would have had to have been the subject matter of the conversation which was illicitly

overheard.

Finally, he would have to be a co-conspirator or co-defendant of the person who fell within the purview of that particular rule or standing.

Q Whether or not named?

A Whether or not named because I think we have to go that far because otherwise there can be a ready and easy circumvention of the rule. I do not contend, however, as the Government suggests, a rule that would permit indiscriminate rummaging through the Government's file to some illicit conduct on behalf of some Federal Agency.

I am confining it to this, and I say the best capsulized sommary that we can fashion to cover all of those things in one short business phrase, and I hope it is not an over simplification, is to give standing to one against whom, whether identified at thetime or not, the search of the Government agents is directed.

Q Plus his co-defendant?

A I said that if the search is directed against him, he is the co-defendant.

Q It was not directed against him, but he was a co-defendant.

A Yes, sir, whether it was named or not.

Q Suppose out in San Francisco the Government illegally bugs a place and they hope to overhear a conversation in which

John Jones name is mentioned. They were not looking for John Jones, but out of something they heard, they look into John Jones and find he has been guilty of income tax evasion, and they prosecutie him for that. Would he have standing?

A It wuould have to be turned over to him for the rule he contended.

Q Even though he was the subject matter, otherwise the Government was innocent?

A Otherwise you cannot get effective compliance of the rule outlawing electronic surveillance.

Q That is why I asked you how far you are going to abolish old rules or standards.

A I am not asking that, Your Honor.

Q I know you are not, but I wonder if it isnot tantamount to that.

A I am asking the Court to fashion a rule of standing which encompasses the interests which I believe need to be served if we are to have an effective exclusionary rule with respect to electronic espionage.

I say to the Court that it will be used because it will still be fruitful and beneficial to Federal agents ---

Q It really sounds to me in the area of electronic surveillance what you are suggesting is that the only really practical way to make deterrents meaningful is just to bar the Government from using any electronic surveillance legally

obtained in any case.

A Except that we are not going to stumble into the pitfall suggested by the Solicitor General that we are asking to go through the Department of Justice and rummage through all of the files which can be classified as garnered illegally.

We are saying that before we have a right to have a disclosure of those materials, we must be in one of the categories which I have gone into.

Q Take the case I have put to you. Jones, in fact, was come upon through this lead in the overheard sample conversations, but Jones knows nothing about this.

A In all of this discussion we had today, and in all of the discussion we had last Term, and we are at the mercy of the good faith of the Department which we do not impugn that they will come forward under the doctrine of Kolod and say we heard John Jones by using an electronic surveillance conducted in San Francisco. Here is the conversation of Mr. Jones. Make the most of it, if you can relate it to your prosecution, we are willing to have any evidence gleaned therefrom stricken.

Of course, it goes without saying that Jones has no way to vindicate his constutional rights.

Q What you are saying is that Jones would not have any right to insist that the Government turn over information to him as to whether or not it had obtained the information

that way?

A He would have the right to insist on it, but he would get it entirely dependent upon the good faith of the Government.

Q Does this mean that in every case the defense hires -- we don't know where the Government got its evidence, but maybe it got it through some lead through illicit electronic surveillance? We want the Government to tell us what it did.

A The Government, under the Kolod case, has an obligation, as I understand, to come forward with any evidence which relates to the defendant, any evidence relating to the defendant which has been seized by electronic surveillance.

Q Of course, the Government had initially come out with the information, but what I am asking is in the Jones case does Jones' lawyer initiate some proceeding to have the Government say whether any of this evidence came in?

A If Kolod is complied with, the Government would admit, but I would say out of an abundance of caution, it would behoove Jones' lawyer to ask the question of whether there was any eavesdropping, whether his premises were invaded or whether he was the subject matter of conversation of others.

Q Then this would be standard procedure in every criminal case Government brings?

A I am afraid it has to be if we are going to effectively deter electronic surveillance.

I think the same results would apply to wiretapping

case.

Q But in the non-wiretapping, nonbugging cases, you would not favor this?

A No. I am confining all of my suggestions and contentionsto the areas to which we are concerned, Mr. Justice Harlan, electronic eavesdropping or electronic surveillance.

Q But can you make the same kind of rule on the basis of your argument?

A Yes.

Q But you don't want to go that far?

A I am not asking the Court to go that far.

Q It is right around the corner.

A As did the Supreme Court of California. I am asking the Court to go only so far as I have contended in cases involving electronic surveillance.

Thank you very much.

(Whereupon, at 12:00 p.m. the Court recessed.)

AFTERNOON SESSION

12:35 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Solicitor General, you may proceed with your argument.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

ON BEHALF OF THE RESPONDENT

MR. GRISWOLD: Mr. Chief Justice, may it please the Court, this is the case of Igor A. Ivanov, who, with John William Butenko, was indicted in the district of New Jersey.

The indictment is in the record and on Page 11 the Grand Jury charged that they and three other persons did unlawfully, willfully and knowingly conspire and agree to communicate, deliver and transmit to a foreign government, which is named, and to representatives and agents thereof, directly and indirectly, information relating to the national defense of the United States of America, and particularly, information relating to the command and control system of the Strategic Air Command of the United States Air Force with intent and reason to believe that the said information would be used to the advantage of a foreign natiion which is named.

The other three persons had diplomatic immunity, being members of a delegation to the United States.

Ivanov is a citizen of the Soviet Union. He was an employee in the United States of America of the Amtor Trading Corporation and as such did not have diplomatic immunity.

Butenko is a citizen of the United States and the question with respect to him which is essentially the same as was with respect to Ivanov is involved in Number 197, which is the next case on the argument list, the problem here in many respects is similar to that in the Alderman and Alderisio cases.

Most of Mr. Williams' argument in this case was in fact directed to the issues in the Alderman and Alderisio case with respect to standing. I will not undertake to discuss that any further except to point out that the statement that the overhearing in Alderman and Alderisio was on Alderisio's business premises is one which has been made by Mr. Williams in the Petition for Rehearing prefaced, of course, with "we understand."

I do not believe it can be found in any paper which has been filed by the Government, except one filed by Mr. Spritzer in which he quoted that passage.

Q But the Government never denied the understanding as expressed in the statement.

A The Government did not assert or deny with respect to that. It did admit that there had been electronic surveillance and in its brief filed in this Court it did make a further statement.

Q What is the position of the Government today on that question?

A The position of the Government today is what is stated in Footnote No. 1 on Page 2 of the Government's brief in the Alderman case: "We are advised that the places where Alderisio's conversations were overheard were not his own, but business establishments owned by associates of his or firms that employed him, and that Alderisio himself did not have office space in the subject premises."

Q What do you mean by "advised"? Did the Court below assume or take the position that this was his business property?

A Mr. Justice, this issue has never been considered in any way, shape or manner by the Court below in this case.

The problem with respect to electronic surveillance of Alderisio did not get into this case until after this Court had denied certiorari.

Q I take it there must be a remand of this case. I gather this is going to be an issue on the fact, isn't it?

A I assume that.

Q Does the Government think that depending on how that issue is resolved there may be a question of standing?

A The issue of standing may be effected by that. It would still be our position that even if it is found that Alderisio has standing, the judge ought to decide in camera whether the material is relevant in any way here for the reasons developed.

Q Is there a difference as to what is relevant that turns on whether or not this was or was not Alderisio's premises?

A I really don't think so, Mr. Justice.

Q This is because, I gather, the Government would allow him only the access to tapes of the conversations of which he was a party or conversations in his presence?

A It would be our position that that ought to be what ought to be considered.

Q This was irrespective of whether it was at his home or elsewhere, or business premises?

A If it was at his home or business premises or Mancuzo's which is a place where he has regular desk space he may have a larger place of standing.

Q He may be entitled to more of the tapes? In other words, he may be entitled to something more than the tapes of conversations to which he was a party?

A He may have standing, but it would still be our position that the judge ought to make a preliminary determination as to whether the material has any conceivable reference to the particular case, particularly as it involved third parties.

Q If there is no standing the tapes never get to him?

A That is correct.

Q If there is no standing or if there is no violation of the Fourth Amendment in the first place?

A That is correct.

Q I am still confused. Is it or is it not the Government's position that all of the tapes of all conversations must be turned over to the judge if it is Alderizio's place of business?

A It is, yes.

Q If it is not,then how much of the tapes are to be turned over, assuming that there are two years of tapes at some place, not Alderisio's place of business?

A In this case they are not packing cases.

Q You know what I am trying to get at. I wish you would help me with it.

A I will try to. I think that if he has standing there ought then to be turned over to the judge any records of conversations in which he was a party on either side. I am inclined to think, myself, any conversations which took place while he was present. I don't know of any authority on that and I am groping on it.

Q To what extent does whether or not the bugging was at his place of business or not at his place of business change the Government's position of what should be turned over to the judge?

A If it was at his place of business I would think

there was greater standing and greater need to turn the material over.

Q Everything?

A Everything.

Q All turned over to the judge?

A Yes, certainly if it was his home.

Q Mr. Solicitor General, I thought I understood the problem, but I am beginning to wonder. Mr. Williams called our attention to Page 21 of your brief in Alderman's case. I read that first paragraph meaning this: that in the Alderman or Alderisio case, or any defendant would be entitled to have the material turned over to him, not to the judge, if, one, he was a participant in the conversations that were overheard, or two, if although not a participant, the overhearing occurred in premises owned by him or in which he had some other interest at the time.

You understand that paragraph to mean that the Government agreed that in either of these events, not that the material was to be turned over to the judge for in camera examination, but that the defendant was entitled to have it turned over to him. Am I wrong?

A I think you are wrong, Mr. Justice. I think the following case will illustrate that to some extent.

Q Is there any instance in which the Government says the defendant is entitled to have material turned over to

him instead of the judge for in camera examination?

A Well, certainly not in a national security case.

Q Forget about national security.

A But that is the reason why I find it very difficult to make a general answer to your question.

Q I am asking you, is there any case, forget about national security, any other case?

A We have taken the position that any conversation between the defendant and his counsel must be turned over without further question.

Q Must be turned over to the defendant?

A To the defendant.

Q Regardless of what is in it?

A Even if it was fixing a golf date.

Q Could I interrupt? Do you mean bypass the in camera inspection?

A Yes, Mr. Justice. We are taking the position that any conversation, leaving out the national security now, too, between the defendant and his counsel must be disclosed.

Q I thought you were taking the position that anything determined by the trial judge in camera to fall into that category must be turned over.

A Yes, that is the objective of turning it over to the trial judge. If he says it must be disclosed under these conditions or in various circumstances we undertake to be

bound by that.

Q I suppose even the Government itself would concede in advance that a good deal of material would be relevant.

A Yes, certainly. Any material which we regard as relevant has, as a matter of fact, over the past three years been turned over to the defense. The problem arises with respect to the material which is contended is not arguably relevant.

Q On the question of standing alone, what is the minimum interest in the premises that the defendant might be able to show that would entitle him to standing?

A I don't know, Mr. Justice. I think the variations in the facts are unlimited and it will probably have to be worked out.

In the Jones case the defendant had small interest in the premises. He was a licensee at will, I suppose, to use the old lingo. He was a guest in the premises, but he was there at the time. There are differences between his owning the premises, the premises being owned by someone else, but he being assigned specific space in them, which is, as of right, for the time-being, and others where he is simply a guest or a transient in the premises.

I find it very difficult to lay down in dogmatic lines as to just where the line should be drawn.

Q Mr. Solicitor General, assume that A invites B and C to a meeting at his house and A consents, asks the Government or consents to the taping of that conversation by the Government. Now, the Government position is that B and C -- has there been any violation of the Fourth Amendment?

A Mr. Justice, I think there may be under the Katz case.

Q Even though A has consented?

A Even though A has consented, just as though the telephone company consented in the Katz case, I don't think that would have made any difference.

I think that B and C have to have such relationship to the premises that they have reason to think that their conversation there is private and not being disclosed.

Q That is not really a relationship to the premises, is it? Let's say that A has a hotel room and he is absent and B and C are in that room. They have no relationship to the premises at all, but they have a reasonable expectation of privacy.

A I would have to know on what basis B and C are in the premises. Did A tell them that they were free to use the room whenever they wanted to or are they invited?

Q What difference does it make?

A I am trying to interpret the Katz case and its limitation and I am not sure just what difference it makes.

I know if it is a telephone booth they have a right to expect that their conversations would not be overheard. I would not assume the Katz case is limited to telephone booths.

Now, turning to the Ivanov case, incidentally, there is an aspect with respect to standing that I can make here. The fact is that Ivanov and Butenko were never overheard talking together. There are overhearings of Ivanov and there are separate overhearings of Butenko. I suppose that an argument could be made that Butenko has no standing to object with respect to the overhearings of Ivanov and visa-versa.

However, in none of these cases did the overhearing have anything whatever to do with the evidence which was actually produced at the trial. It is totally irrelevant to that and the problem with which I am concerned here is the appropriate protection of the Executive Branch of the Government in carrying out the President's responsibility to conduct the foreign relations of the United States and his responsibility as Commander-in-Chief of the Army and Navy.

I think an argument could be made that what was done here does not violate the Fourth Amendment because the Fourth Amendment forbids unreasonable searches and siezures -- in those words.

The question as to what is reasonable obviously varies with the circumstances. But we are not making any contention and there is not involved in this case any question of the

admission of evidence which was obtained by reason of electronic surveillance. We are contending that there is no evidence submitted in this case which is the fruit of the poisenous tree which was derived from electronic surveillance.

Mr. Williams has argued very eloquently that in a free country that the Executive ought to be free to do this, but then it ought to be put to the choice, either to disclose or to abandon the prosecution.

Now, actually, as has been pointed out in the Coplon case, the prosecution was abandoned. Mr. Williams said that was the only one in all the years since, but in the brief for Butenko on Page 27 there are cited two other cases: United States vs. Egorov and United States vs. Sokolov, which cases were dismissed "in the interests of national security."

There have been other cases which have not been brought because the evidence was in fact obtained through illegal surveillance and the officers of the Government felt that they could not appropriately proceed in those cases.

But here we have a United States citizen and a Russian citizen not entitled to diplomatic immunity, and we have a situation where disclosure has been made that there was electronic surveillance and the suggestion is made that that electronic surveillance is entirely irrelevant to anything that has appeared in the prosecution and it is our position, and I think I should be frank to say that this is the case with which

we are concerned, not Alderman and Alderisio, we can live with that, of course.

Q Do you mean by that that if we were to come out contrary to your position in the Alderman case you would still urge that there are other reasons why we ought to require in camera inspection?

A Yes, exactly. The whole relation of the Executive power here and the whole question of the balance, which, it seems to me, is clear and important.

Q Suppose we came out contrary to your position in Alderman, how would you suggest the issue of national security be brought to the attention of a trial judge in a case like this, by representation of an assistant U. S. attorney?

A Yes, Mr. Justice.

Q That would be enough?

A I don't know of any other way that it would be.

Q I think you have procedures in the Justice Department where the representations are made by someone of very much higher authority than a U. S. attorney.

A The question would be undoubtedly considered by people with higher offices in the Department of Justice.

Q My premise is that you are not ordinarily entitled to an in camera inspection, but your argument is that there should be an exception in a national security case. I am just wondering how it would be brought to the attention of a trial

judge, by an assistant U. S. attorney?

A That leaves the impression that the assistant United States Attorney is acting on his own in the provinces someplace and maybe he will and maybe he will not. Actually, these matters are closely watched by senior officers in the Department of Justice and the U. S. Attorney acts on instructions.

Q This Ivanov and Butenko case, you are proposing that the material be submitted to the judge during an in camera inspection, are you not?

A Yes, Mr. Justice.

Q Maybe I didn't follow you and Justice Brennan, but you don't refuse to submit it to the Judge for in camera inspection the issue is whether it should be turned over to the defendants or defendant's counsel for their inspection without first being sifted by the judge to determine the relevance?

A That is exactly our position here. I might say I had a good deal of difficulty getting it established that we could take that position here. The view which would be taken in a case of this sort in any other country that I know of is that neither this court or anything else would have heard anything bout it.

We have not taken that position. We have made the disclosure that there was electronic surveillance.

Following the order in the Kolod case we have sought

to get that order modified so that although there will be disclosure it will be disclosure to the district judge.

Here all the protective orders that Mr. Williams can devise will not help because if it is disclosed to counsel and the parties it is disclosed to a man who has direct contact to the place where it is not desirable in the national interest that there be disclosure.

Q Are you asking us to decide here or to leave open on remand the question as to whether this violates, this bugging in this particular case, violates the Fourth Amendment?

A Our position would be the same had it or not. We are not arguing that it did not violate the Fourth Amendment. We are suggesting that there is ground when it could be argued and there may be some future day when another party comes along where it may be said that it could be developed that evidence was developed against German saboteurs who landed on our shores and it may be that the evidence was obtained by wire-tapping and electronic surveillance and that that is the evidence which there was and which the Government chose to produce.

I frankly would not want to foreclose on such a case that may be made in time of war. In this case we are not saying that any evidence obtained was so inadmissible, we are only contending that when the position is that the electronic surveillance did not in any way lead to the evidence which was

used in the court, that the decision of that question should be made by the district judge in camera without disclosure to the parties or their counsel.

Q In other words, the premise in which you are proceeding here is that you admit for the purposes of this case that this was illegal bugging?

A Yes, Mr. Justice.

Q But certainly the case would not even be here if there were not a violation of the Fourth Amendment.

A I still, Mr. Justice, would like to reserve at some time the right to argue that there has not been a violation of the Fourth Amendment, but we are proceeding for the purpose of this case that this was taken in violation of the Fourth Amendment.

Q And you are going to remain free to argue to the district judget that there was no violation?

A No, sir.

Q You want to leave it open for another case?

A I want to reserve it for another case at another time under different circumstances involving the national security.

Another thing that turns up in the national security issue is that people just wander into the surveillance. Let us suppose that the Government has been duly authorized by the Attorney General to enter into a surveillance directly

connected with the national security. One can say that it is not. Suppose the record reads like this: The person answers the telephone and says: "Hello." The other party says, "This is John Brown, I want to talk to Joe." The response is: "Joe who?" The calling party says, "Joe Smith, of course." To which the response is: "There is no Joe Smith here. You must have the wrong number." And he hangs up.

Two years later an indictment is found against John Brown for failure to report for induction to the draft. Now, the crime of failing to report for induction into the draft is done publicly. It is in a place where many people are and the person simply does not respond to the call. There is no way that electronic surveillance can lead to evidence of that essentially undisputed fact.

In due course, however, the Government finds that a conversation of John Brown has been intersected in connection with surveillance activity. The Government feels obligated to disclose this to the dourt despite the fact that the conversation has no relevance with respect to or in connection with the draft prosecution, but to disclose the conversation to the defendant would disclose the place, time, method and object of the surveillance, a disclosure, I am advised, which simply cannot be made in many cases of this type.

I would point out that in Mr. Williams' brief in this case, quoting from a transcript made in another case, the name

of a foreign country is placed in print, not disclosed by the Government representative in that case, but by the court.

We have accepted the fact that we cannot make this determination for ourselves. Even in the clearest cases, although that is undoubtedly what would be done in virtually every other country in the world, we do submit that we have met our responsibilities and that the competing factors are adequately balanced if we make our disclosure to the judge.

If he determines that the material is irrelevant no further disclosure would be made. The material disclosed to him would be sealed and made available to the appellate court for review.

On the other hand, if he determines that the material could be relevant then the Government would have to decide in such a case whether to make the disclosure to the defendant and his counsel or if it is a case where national security is involved, to dismiss the prosecution.

Thirty years ago, I am told, when Mr. Simpson became Secretary of State -- almost forty years ago, he determined the activities in the State Department by which there was surveillance of foreign activities, saying, "Gentlemen, do not open other people's mail." But in 1940, under different conditions and under President Roosevelt, that rule has been changed.

I would hope that we would not get into a situation where the United States has its arm tied behind its back in the

way that no other nation has and I think that the interest of the Government can be adequately protected and the interest of the defendant by providing for disclosing to the trial court in cases of this sort.

Q Mr. Solicitor General, I am not quite clear on the Constitutional distinction you make between national security cases and other cases of illegal espionage.

A Speaking in Constitutional terms, I would rely on the power of the President to carry on foreign relations and the power and responsibility of the President as Commander-in-Chief of the Army and Navy. There are numerous decisions of this court which have recognized the importance of these powers and which have said that the -- well, for example, in Kennedy against Mendosa-Martinus, while the Constitution protects against invasion of individual rights, it is not a suicide pact.

Similarly, in the Chicago and Southern Airlines case, the Court referred to the fact that the President, both as Commander-in-Chief and as the national organ for foreign affairs, has available intelligence services whose reports are not and ought not be published to the world. It is because of these powers expressly granted by the Constitution which in my submission must be interpreted together with the Fourth Amendment which does not forbid all searches and seizures, but only unreasonable ones.

I would argue that in this case, while we are not seeking to bring the material into evidence, but are seeking merely to show that it has no conceivable relationship to the prosecution, that a determination by the fact by the independent district judge adequately protects the interests of the defendant.

Q I assume that the core of the distinction you draw between Alderman, on the assumption that your in camera position doesn't prevail in the Alderman case, is that a protective order there may suffice to protect the interests of third parties whereas in a national security case protective orders have no efficacy.

A By its very nature the protective order cannot protect. That would be a substantial part of the distinction.

Q Are any of those cases you just cited to us premised on the illegality of the Government's action? Does it flow from that that any action that the President takes which bears upon his duties as Commander-in-Chief or in foreign affairs, regardless of whether it is legal or illegal, must be sustained by the courts?

A Certainly not, Mr. Chief Justice.

Q Where do you draw the line?

A I think it is very difficult to draw the line. If it is a question of balance, in this case when the materials are seen by the district judge it will be perfectly apparent that it bears no relation to the prosecution. When the alterna-

tive is that it either must be disclosed directly to the foreign nation or that the prosecution must be dismissed. It seems to me appropriate to draw the line at a place where it says that there need not be further disclosure when there has been an independent determination by the district judge of the question of relevance, particularly when that type of question of relevance is one that judges habitually make and in which they make in a number of other situations which, although not the same, are analogous to this, such as those with respect to the Jencks Act, such as disclosure of Grand Jury minutes, discovery of evidence and things of that sort.

Q What stage of the proceedings should this information be brought to the attention of the Court and counsel?

A Mr. Chief Justice, that is again a difficult question. One might think that in many situations one could say that it should be before the trial. On the other hand, at that point it is very difficult for the judge to have any ideas as to whether the material is relevant to what will be brought out at trial.

In most cases it seems to me that it is best to have the disclosure made after the conclusion of the trial, at which time the judge knows what the evidence was and has some busis for determining whether it had any source in the material.

That has two effects. On is that if the judge decides that the evidence was tainted, then there must be a new trial, but the other is that because of that the Government prosecutor is going to be extremely careful to see that he does not introduce evidence which can be regarded as tainted because he does not want to be regarded as going through the process of having a trial and then having it set aside.

In most cases it would be my view that as in this case it is wiser to have the disclosure made after the conclusion of the trial rather than beforehand.

Q The maximum that the Government really has to suffer in any of these cases is dismissal of the prosecution.

A I believe so.

Q That is the same whether it is national security or not.

A That, in an aggregate, can be a serious matter.

Q The interest of the defendant is the same and the interest of the Government prosecuting is the same. It is just that the reason for not disclosing is the barrier. In other words, in any of these cases, the maximum harm that can come to the Government is the dismissal.

A I believe so. I think that is a very considerable harm.

(Whereupon, the above-entitled oral argument was concluded.)