

Supreme Court of the United States

OCT. TERM 1968

In the Matter of:

-----	:	Docket No. 197
	:	
John William Butenko,	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	
United States of America	:	
	:	
Respondent	:	
-----	:	

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Place Washington, D. C.

Date October 14, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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ARGUMENT OF:

P A G E

Charles Danzig, Esq., on behalf of
the Petitioner

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Erwin N. Griswold, Esq., on behalf of
the Respondent

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 ----- X
4 John William Butenko, :
5 Petitioner :
6 v. : No. 197
7 United States of America :
8 Respondent :
9 ----- X

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

12 The above-entitled matter came on for argument at
13 1:30 p.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
20 POTTER STEWART, Associate Justice
21 BYRON R. WHITE Associate Justice
22 ABE FORTAS, Associate Justice
23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 CHARLES DANZIG, Esq.
Counsel for Petitioner

ERWIN N. GRISWOLD, Esq.
Solicitor General
Washington, D. C.
Counsel for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 197, John William Butenko, Petitioner, versus the United States.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: You may proceed with your argument, Mr. Danzig.

ORAL ARGUMENT OF CHARLES DANZIG, ESQ.

ON BEHALF OF PETITIONER

MR. DANZIG: Mr. Chief Justice, and may it please the court, the defendant Butenko is a co-defendant in the prior case of Ivanov, argument on which the court has just heard.

I want to mention at the outset that there are three other conspirators who were charged in the conspiracy, but who were unindicted by reason of diplomatic immunity. Their presence may have some relationship to the problem of standing when it gets up into the argument.

Now, when the Court projects the issues in this case the issues were projected on the assumption that there had been an electronic surveillance in violation of the Fourth Amendment. We are past that point now because the Government has frankly admitted that it has overheard conversations of Ivanov and Butenko. It has said nothing to date about any conversations it overheard of the other three co-conspirators who were not indicted. Of course, what it heard there may constitute a lead to the two defendants who were tried and

1 convicted.

2 The main position of the Government is rather interest-
3 ing. It takes the position that whatever logs, whatever
4 information it has on unlawful surveillances with respect to
5 these two defendants should be turned over to a court for
6 examination in camera.

7 It says also quite clearly in its brief, that if that
8 were done it is confident that the court would not find that there
9 is any information in those papers and records that were
10 turned over to the court in camera that could in any way have
11 lead to the conviction, to evidence that was used in a
12 conviction.

13 I accept that statement of the Government as an
14 absolute verity, and accepting it as an absolute verity, let
15 us see where we go with this case on the basis of the
16 Government's position. The Government comes in with these
17 records, gives them to the court in camera and the court now
18 can only do one thing, we are really in a post-conviction
19 situation and not a pre-trial situation as far as Ivanov and
20 Butenko are concerned. There is a massive record of about 3500
21 pages, a good deal of documentary evidence, and I suppose the
22 court, being a diligent Federal judge, will sit down and make
23 a mechanical comparison of what the record it has received in
24 camera contains and what the transcript shows.

25 Assume that mechanical comparison is made, and assume

1 as I have assumed, the absolute truth of the Government's
2 statement in its brief that an examination of these records in
3 camera will convince any judge that they are in no way
4 arguably relevant to the conviction. I say that if we buy
5 that position or sanction it in any manner whatsoever, that is
6 the end of the case. That is the end of Mr. Alderesio and Mr.
7 Alderman and Kolod and a lot of other people who are in
8 similar circumstances. This is rather interesting, because
9 if that happens we have no problem with national security, nor
10 do we have any problem with the rights of third persons, to
11 what extent they may be injured in person or reputation, they
12 just fall by the wayside on the basis of these assumptions.

13 The court will never reach those questions. This is
14 exactly the position the Government has taken on the point of
15 national security at about Page 8 or 9 in this brief here in
16 Butenko. They say, please do not put us to the option of making
17 a choice whether to dismiss the prosecution or whether to make
18 a revelation of what we have gathered. Please let us bring
19 this in in camera and we can satisfy any judge that there is
20 nothing in these records which in any way affects the prosecu-
21 tion.

22 So we have no problem with national security, no
23 problem of injury to third persons. Now, let us see whether or
24 not this position has any merit. I submit it has none. It is
25 violative of so many things that have been said time and time

1 again with respect to this court with respect to this in
2 camera or ex parte decisions.

3 Take the Jencks case or the Dennis case which requires
4 a turn-over of material. It has been said that that turn-over
5 has been based not on Constitutional requirements, but on the
6 supervisory power this court has over the administration of
7 justice in the Federal courts. On that basis it would seem to
8 me an in camera proceeding would be unjustified.

9 The Fifth Amendment which guarantees to everybody in
10 these United States due process of law -- wouldn't that be
11 violated by the Government going in with a mass of material,
12 unattended by the defense either through counsel or through the
13 defendant himself?

14 Then we look at the protection of the Sixth Amendment
15 which calls for the assistance of counsel, a public trial,
16 the right to confront the witness against you. None of those
17 requirements which are imbedded in our Constitution unmistakably
18 are observed by this procedure which the Government wants this
19 court to approve.

20 Now, when we take a look at the kind of records we
21 have that they want to submit to a court, that, too, should
22 give us pause. I have not seen nor has anybody seen the kind
23 of records they have in this case. This they will not show us
24 until this court determines how, if at all, they are to be
25 shown. But we do have some information on that and consider

1 information is incorporated in Mr. Williams' brief in
2 Alderman and some of it appears in his brief in Ivanov.

3 What do we have there? We find a rather shocking
4 situation. We find a serious question of whether all the
5 records have been produced in the first instance. Every time
6 they produce records they come along at some later time and say
7 "We didn't know about this batch that turned up in some drawer
8 or corner."

9 When the records are produced we find that there is
10 information in there that is comingled with other information
11 so as to conceal the source. Euphemisms and symbols are used to
12 conceal whether or not the source of the information came from a
13 live investigator, from an electronic bug or even a wire tap.

14 There are cases where there are no records at all, as
15 in the case Mr. Williams adverted to where the agent heard the
16 telephone, played back the tapes, heard the conversation,
17 called agents all over the country and started a chain of
18 investigations on people. He has nothing.

19 Now, when we see the nature of the records and we can
20 only go by what we have seen in the past and what is now known
21 and has appeared time and time before this court, when we see
22 what kind of records they want to submit to a court in camera,
23 we say that we are not having our Constitutional rights
24 protected. We are advocating a course of conduct that is
25 violative of those rights and the only way we can find out

1 whether there is any integrity to the record or whether or not
2 there is some illegality that has been concealed is by having
3 a full-fledged adversary hearing at which extrinsic evidence
4 must be produced so that the defendant can be confronted with
5 a live witness and not a record, the genuineness of which can
6 be questioned.

7 If we start with that no court of justice in the pur-
8 suit of justice can tolerate a course such as is now being
9 seriously advanced by a Government.

10 Q What does that mean in practice? Does that mean
11 that you would be entitled to subpoena the agents who over-
12 heard the conversation? You would be entitled to subpoena them
13 to make sure that the records were complete.

14 A Yes.

15 Q Would you be entitled to subpoena the agents who
16 investigated the case generally to see whether they utilized
17 any of that information?

18 A I should think so, Your Honor.

19 Q Then would you be entitled to subpoena the lawyers
20 who put the case together for the utilization of the Grand
21 Jury to see if they utilized that information?

22 A That has been done in one case and I would say
23 yes, at least to see how much of the evidence, which on our
24 assumption has been illegally obtained, because if we are going
25 to extirpate this evil, and an evil it is, and the extent of

1 of the evil has been mentioned quite clearly by decisions of
2 this court such as in Katz and Burger and other decisions that
3 don't come to mind, the Government must bear the burden of purg-
4 ing itself and the defense should have the right to call these
5 agents as though they are hostile and court's witnesses and
6 cross-examine them as happened in Way, where we have a Jencks
7 statute.

8 Q You are making no distinction between national
9 security cases and other cases?

10 A Your Honor, it seems to me that the national
11 security problem has been resolved by the decision of this
12 court in Jencks and Roviato where this bogeyman has been
13 raised and nobody knows where it is really national security
14 or isn't.

15 If we could agree on a definition here -- I don't
16 know whether or not there are facts which would get this
17 particular case into that definition.

18 Q Espionage on behalf of a foreign power, as is
19 alleged to be the case here, is kind of close to national
20 security.

21 A It is a very seductive situation and very easy to
22 accept as national security, but the content of the crime, that
23 is, what actually did happen here or what they could have gotten
24 through this -- I don't want to call him menial, because he
25 has a very high title like assistant director, but I am talking

1 about Butenko, but the papers he has access to, and I know
2 nothing about the trial, I have only read part of the record,
3 indicates that he did not have access to anything of any great
4 importance, but that is not the fact of the matter here. The
5 important part is that they have, I think, merely invoked the
6 spector of national security to gain their main objective, and
7 that is to have an in camera hearing.

8 Q The reason I was asking these questions is, what
9 is going on in my mind is this: If you take the sweep of what
10 Mr. Williams is talking about and what you are talking about as
11 I understand it, national security cases don't mean that wherever
12 there has been any electronic espionage over a vast area that
13 may have some relationship to the defendant that in that vast
14 area the Government is really faced with dismissing the case
15 if there has been any electronic espionage or electronic
16 surveillance in this vast area that we were discussing with
17 Mr. Williams.

18 A I think that would be a fair position to put the
19 Government into since it, itself, has created the predicament
20 it finds itself in. Under the Crime Control Act it becomes
21 a simple matter. You apply for a warrant or court order but
22 prior to that there have been occasions where the Government
23 in authority wanted to have information and they authorize an
24 electronic surveillance of one kind or another. It could have
25 been done with Constitutional confines, but this Government

1 has acted lawlessly and set a very poor example for the rest
2 of the people in these United States.

3 Now, let us go to the actual procedure that was
4 used here for us to determine whether or not an in camera
5 proceeding could in any way produce a fair result. The case
6 was tried in a very interesting way by the United States
7 Attorney. He put on agent after agent and did not have them
8 testify as to all the observations they made over a period of
9 six months while these people were under surveillance. He
10 put them on for April 21 and after he testified to the
11 surveillance, he put him over and put another agent on who
12 picked up the surveillance and went on with him and so on.

13 He has the total say's surveillance in that particular
14 day. Then he went on with other agents to go on to other
15 surveillance in the succeeding days that the surveillance went
16 on. That was a good way of doing it because the jury did not
17 get confused. It could keep track of the surveillance and keep
18 track of what these people do.

19 On Sunday, May 26, on Page 595 of the Appellate
20 record a person named Proilliak was surveilling the defendant
21 Butenko at his apartment in Orange, New Jersey, starting at
22 9:30 in the morning. Mr. Butenko went to the store, bought a
23 Sunday paper, went back and stayed all day, then got into his
24 car at 5:20 p.m., and went down Park Avenue until he hit the
25 Garden State Parkway. The agent testified that he discontinued

1 surveillance. He also testified that he reinstated surveil-
2 lance about an hour later and picked up Mr. Butenko's car about
3 twenty miles north from the point where he terminated his
4 surveillance in front of a restaurant in North Jersey.

5 Now, we are talking about North Jersey, a heavily
6 trafficked area, many cars out on a Sunday, and the Jury would
7 get the impression that Mr. Butenko had alluded his tail, the
8 man who was watching him.

9 Oddly enough, Mr. Roderick, the agent, had no trouble
10 picking up Mr. Butenko some twenty miles away some two hours
11 later. Mr. Butenko comes into sight of three agents who are
12 now in a trailer which is used on a construction site on a
13 parking lot and that agent with a pair of binoculars, and his
14 two assistants with him, testifies that he saw the Russians
15 in their car come in at 6:15 and Mr. Butenko in his little
16 Falcon come in a few minutes later and they all went around.

17 Nobody got out of the car but they all followed one
18 another out so that the two cars met.

19 Now, I think the F.B.I is pretty good, but I don't
20 think they are that good that they could follow an automobile
21 through North Jersey, have a surveillance interrupted and then
22 pick it up some two hours later.

23 The clue to the thing is that these three agents who
24 were in this trailer were there from 3 o'clock on that Sunday
25 afternoon, the same day, May 26, and they were expecting Mr.

1 Butenko and expecting the Russians. I ask, how could they have
2 known of this rendezvous but through the bug on somebody? To
3 try this case on the theory that all this was obtained through
4 physical surveillance and not through the bug leaves an
5 impression on a jury's mind which is not quite consistent with
6 the fact.

7 It makes me question whether or not evidence of that
8 nature is reliable and whether all these physical surveillances
9 were not a way of concealing the real source of the information,
10 namely, the bug.

11 I want to repeat a question that Mr. Justice Brennan
12 put in his concurring opinion in Palermo, whether or not the
13 interpretation placed on that statute, the Jencks Act, would
14 not encourage agents to prepare their reports in such fashion
15 so they would be insulated from production and I question whether
16 or not these physical surveillances and this omission of
17 information about the real source of the clues and the rendezvous
18 and whatever else was used in the conviction of this evidence,
19 I question whether or not these records may not, in view of the
20 absolute faith the Government has in submitting these records
21 in camera, that it will disclose nothing relevant, I question as
22 Mr. Justice Brennan did whether or not these records contain
23 anything about electronic information.

24 And, absent an adversary hearing, we will never know
25 and illegality will be the rule rather than the exception

1 On our position in standing, I think that has been
2 made clear in the brief. I don't have any more time.

3 Q I gather your position goes beyond the one stated
4 by Mr. Williams.

5 A Yes, Your Honor. I go all the way. I don't go
6 there. I am drawn there as a result of what this court has
7 said about the deterrence theory of the exclusionary rule and also
8 the other aspect of it.

9 Q Just simply stated, it is logical if the exclu-
10 sionary rule is designed to deter illegal action by Government
11 enforcement authorities, then no matter how they get it and no
12 matter who is hurt, they should not be able to use it.

13 A Yes, and I add to that that in fact if that
14 rule is not adopted it is putting the stamp of approval on the
15 use of evidence that has been illegally obtained.

16 Q Again, that is not the issue because I take it
17 that the Government is not contending for the right to use
18 evidence obtained by electronic surveillance. The question is,
19 what should be the mechanism for determining whether the
20 recorded or logged information obtained by electronic surveil-
21 lance is arguably relevant to the prosecution or the defense
22 in this particular case. Would you agree with that?

23 A I think that is the issue. What is the
24 mechanism? What procedure will we use?

25 Q Nobody is arguing here in this case or in any

1 cases that even in national defense matters unlawfully
2 obtained information, information obtained as a result of
3 unlawful electronic surveillance should be admissible in
4 evidence. The Solicitor General says he may want to argue that
5 in a later case where it is a national security case, but he is
6 not arguing it now.

7 A I agree that that is the issue, but I say that
8 the procedure which the Government suggests is one that
9 violates Constitutional guarantees. The only way the
10 defendant's rights, as announced time and time again by this
11 court in similar situations or in a different context has been
12 that you must have an adversary hearing.

13 I say if we buy this position of an in camera
14 inspection that is the end of this case.

15 Q Do you understand that the Government raises the
16 standing question in either case or is asking that any standing
17 question be litigated?

18 A I don't think it has come forth with that, but
19 standing has been a projection of this court in its limited
20 writ of certiorari.

21 Q I was just wondering whether you understand that
22 the Government was raising it.

23 A There is no need for them to raise it for the
24 simple reason that if they get an in camera inspection we will
25 have nothing. We don't reach the question of standing just as

1 we don't reach the question of national security and we don't
2 reach the question of whether the disclosure of these records
3 or an adversary hearing involving cross-examination of agents
4 will injure third persons. We don't get to that. It is a nice
5 way of closing the door and not opening Pandora's box.

6 Q You are saying the Government's non-disclosure
7 and the trial judge's natural tendency with going along with
8 the Government will make it an idle ceremony. You are not
9 asking us to assume that the Government is going to do something
10 like that or the trial judge is going to be as inept as that,
11 as you would assume, do you?

12 A No, I don't assume that at all, but I do assume
13 that the Government told the truth when he said a submission
14 of these records to a trial judge will convince him there is
15 nothing arguably relevant to the prosecution.

16 Q That should end it.

17 A That will end it. That is exactly what they want
18 to do but I say it is wrong to end it there. There has to be
19 a full-fledged inquiry.

20 Q Suppose that turns out to be a fact after a full-
21 fledged inquiry that there is absolutely nothing that is
22 arguably relevant to the prosecution or the defense in the
23 matter? Let's take a ridiculous illustration that they did
24 bug the premises and the only thing they got was some conver-
25 sation about the weather and golf; don't you think that ought

1 to end the matter in the sense that the prosecution goes ahead?

2 A If the defense can show nothing more than that,
3 that certainly ought to end the matter. I don't think the
4 defense has the right to go in and say "Let me look at all your
5 files." It should be allowed to look at all files and examine
6 all agents who at one time or another made these defendants the
7 subject matter of the investigation, the target of the elec-
8 tronic surveillance, whether it was these defendants, co-
9 conspirators or third persons. They come within the ambit of
10 the illegal activity of the Government efforts to gather evidence
11 on them.

12 Q Is it true that the only reason we know that there
13 was electronic surveillance in this case is because of the
14 voluntary disclosure of the fact by the Government after the
15 trial?

16 A I think that is so, Your Honor.

17 Q And that was done informally with what has been
18 described as a current Government policy; is that right?

19 A I think that is so. Current Government policy is,
20 "We will tell you a little, but not everything, but we want to
21 tell it to the judge and not to you."

22 Q What if the policy should change?

23 A And they tell us nothing?

24 Q Yes. Do you think the defendant in every case
25 has a right to file a motion or an interrogatory?

1 A I think so, Your Honor, because if we are going
2 to put an end to this dirty business of eavesdropping and
3 violating privacy and violating the Fourth Amendment rights
4 there should be some remedy available to the defendant to raise
5 that question.

6
7 That would not make everybody in the United States
8 eligible to raise the question. It is only those who are
9 accused of crime or who get involved with the Government.

10 Thank you.

11 CHIEF JUSTICE WARREN: Mr. Solicitor General.

12 ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.

13 ON BEHALF OF RESPONDENT

14 MR. GRISWOLD: Mr. Chief Justice, may it please the
15 court, I would not have supposed that it would be suggested that
16 this was not a case involving the national security. The fact
17 is that Butenko, as an American citizen, was employed by the
18 International Electronic Corporation which was under contract
19 with the Air Force to produce a command and control system for
20 the Strategic Air Command. The system includes data processing
21 and computer programming equipment designed to store and trans-
22 mit operational equipment such as the location of aircraft and
23 distances from targets which will enable the Commander of the
24 Strategic Air Command to alert and execute all his forces at
25 an extremely rapid rate and provide him with up-to-the-minute

1 information on the status of the total force. The information
2 supplied by the system may be applied by a picture projected
3 on a screen or printed in page form.

4 Butenko, who had top secret clearance, was the control
5 administrator for the project's field operations division with
6 complete clearance. There is no doubt that he turned over
7 materials to a foreign country. Now, it is true that the
8 phrase "national security" can be used loosely. It can be
9 used, for example, to relate to efforts to combat organized
10 crime and things of that sort. As we have used it in these
11 cases it relates solely to relations with foreign nations and
12 to efforts to guard against espionage and to protect military
13 and national secrets of the United States.

14 I would emphasize again that we are not in this case
15 seeking to argue that the evidence is admissible, although I
16 can conceive of cases, as for example, if the information is
17 obtained there is a ship on the high seas which contains a
18 nuclear device which, when the ship gets to New York Harbor, is
19 going to be exploded, and by virtue of very effective and
20 determined detective skills it is not only found where the
21 ship is, but it is also found that it was being brought here
22 by a group of Americans who were seeking to take over the Govern-
23 ment at some point, it seems to me there ought to be freedom to
24 argue that whatever method was used to obtain evidence with
25 respect to that transaction is not unreasonable search under

1 the Fourth Amendment.

2 Q Suppose something that doesn't take place in the
3 United States and is not covered by the Fourth Amendment.

4 Suppose there is electronic surveillance in England. There is
5 not any problem in England because there is no Fourth Amendment.

6 A But if it is done by officers of the United States
7 I would find it difficult to argue that the Fourth Amendment,
8 whatever it means, is not applicable to the officers of the
9 United States.

10 Q What if something happens in Iran or Italy or
11 Japan; isn't that covered by the Fourth Amendment?

12 A I suppose that a courtmartial trial in Germany
13 is covered by the Fifth Amendment and a courts martial trial of
14 a United States military person, if it is an effort to exercise
15 the forceful power of the United States that power is limited by
16 the Fifth Amendment and by the Fourth Amendment, I would
17 assume.

18 At any rate, we don't have that involved here.

19 Q In your illustration, Mr. Solicitor General,
20 suppose the information to be used in the prosecution of the
21 Americans who were bringing the nuclear ship into New York
22 Harbor -- I assume they planned to get out before the nuclear
23 explosion occurred.

24 A They were going to stay far enough away so
25 they could move in after the chaos.

1 Q Assume the Federal agents moved into their office
2 and took documents, could those later be used?

3 A Yes, I would not regard that as different from
4 this. The question is, what is the unreasonable search and
5 seizure. I think reasonable has to be construed in the light
6 of all the facts and circumstances. Mr. Danzig has talked
7 about how nefarious the Government is in these places. All I
8 can say is that five Presidents and ten Attorneys General have
9 regarded it as appropriate and necessary to do what has been
10 done here and anyone who carries the responsibility of the
11 protecting of the people of this country against possible
12 foreign attack will recognize the need to be very thorough and
13 comprehensive in that task.

14 Q Does your argument lead to the conclusion that
15 an unreasonable search, one of the circumstances to be determined
16 is the enormity of the crime?

17 A Yes, Mr. Justice, I would think that that is a
18 way of putting it. The only crime that is enormous enough, it
19 seems to me, would be massive treason, massive, the destruction
20 of people and property of the country. I would not make it
21 applicable to any ordinary crime.

22 Q What about mass destruction?

23 A It depends on how big the mass is.

24 Q Do you agree or disagree?

25 A All that I am trying to do is reserve for the

1 future with respect to the case the awful facts of which I
2 cannot now imagine, the right to contend that very vigorous
3 and thorough activities made by the people responsible for
4 protecting the country are not the same as those to protect
5 the activities admitted into evidence. We are not making any
6 argument here. We are not saying that any evidence here is
7 obtained by these methods or any evidence which was
8 produced from a lead obtained from these methods is admissible
9 in this case.

10 We are arguing here simply that in a situation where
11 it is perfectly plain that the electronic surveillance had no
12 relation whatever to the evidence produced at the trial, that
13 we should be free to establish that fact before the United
14 States district judge without its being disclosed, not
15 merely to the defendant, but as is inevitable in cases of
16 this sort, to the other nation which may be involved.

17 Q Aren't there two things we have to consider here?
18 One is the question of the violation, alleged violation of the
19 individual rights of a person who is on trial for his life or
20 liberty and secondly, the power of deterrence from doing
21 illegal things by the Government?

22 We have read in the past -- everyone has, I think,
23 that the Government from time to time has disavowed any wire-
24 tapping or any bugging, except, as has been said, in a very,
25 very few national security cases. I think the figure has been

1 as low as 20 or 30 in the country at a particular time. Now,
2 we find out that after this new policy of the Government has been
3 announced that they have been bugging in all fields. We find
4 in the Katz case, in a small gambling case that ends up in a
5 fine of \$200 that the Government bugged this place for over a
6 month, night and day, and we find that apparently there were a
7 great many Internal Revenue cases where they have bugged the
8 person just on income tax violations. Still the Government
9 asserts it was only done in national security cases.

10 Don't we have to fashion a rule that will prevent the
11 Government from doing that very thing? If there is a way of
12 permitting wire-tapping or other bugging in national security
13 cases, shouldn't there be a law designed to accomplish that
14 purpose and hasn't the Congress designed such a law? It
15 doesn't affect these cases, but I would assume that if we have
16 a proper deterrent so far as illegal wire-tapping is concerned,
17 that the Government will thereafter follow the law as long as
18 it is sustained.

19 What the effect of that law is, we don't know, whether
20 it is Constitutional or not, we don't know, but should we not in
21 the future require the Government in all cases, whether it is
22 national security or not, to abide by the law that Congress
23 makes, and if the Congress has said it is illegal under the
24 Communications Act to do what has been done, shouldn't we
25 abide by that?

1 A Mr. Justice, may I say in partial answer to
2 that that what was done in the Katz case was legal when it was
3 done. It only became illegal as a result of the Katz decision
4 itself.

5 Q If the court had said that that was legal at that
6 time, I think you would have followed it.

7 A It is true that during the past summer Congress
8 has enacted a statute which expressly excludes national
9 security, expressly authorizes surveillance in national security
10 situations.

11 Q But in a certain manner, not any way they want to
12 do it.

13 A It is in quite broad terms, Mr. Justice, when
14 authorized by the Attorney General. Then, finally, with respect
15 to what is your question, a great many things happened prior
16 to 1965, many things which I regret, many things which have
17 caused great difficulties for me and through us, for the
18 courts. Since 1965, the requirements have been very clear and
19 very specific. There is no eavesdropping or bugging whatever
20 since 1965 and I know of no case where there has been any
21 evidence whatever that there has been bugging or eavesdropping
22 except in the cases of national security.

23 The passage of the act passed by the Congress this
24 summer, the Omnibus Crime Control and Safe Streets Act, is on
25 Page 7 of our brief in Ivanov and Butenko and nothing in this

1 chapter or Section 605 of the Communications Act shall limit
2 the Constitutional power of the President to take such measures
3 as he deems necessary to protect the nation against potential
4 or actual attack from acts of a hostile power to obtain foreign
5 intelligence information deemed essential to the United States.

6 All we would contend here would be a decision which
7 would leave that statement by Congress in effective operation
8 and if there has to be disclosure of merely incidental, and
9 I would like to point out, counsel on the other side have quite
10 appropriately contended in terms of masses of material and
11 inevitable connection with the case involved, the fact is that
12 in a number of these situations, people just wander into a
13 surveillance.

14 It is perfectly incidental, perfectly accidental,
15 perfectly obvious that nothing out of it has any relation to
16 the subsequent and wholly unrelated crime. We have felt that
17 whenever the name appears that we must make disclosure to the
18 Court as we have, but we do feel that the defendant can be
19 adequately protected if the details are disclosed to the
20 district judge and he can determine that nothing happens that
21 is relevant to the prosecution.

22 Q As I understand you are basing your distinction
23 between national security and cases that do not involve the
24 national security on the rule fashioned by Congress that is
25 the interpretation of the Constitution itself.

1 A No, Mr. Justice, I don't understand that the
2 recent act of Congress controls these cases. I know of nothing
3 in it which is formally retroactive. I would suppose that the
4 decision made in this case would have to be one fashioned by
5 this court of of the materials which are available to Courts
6 which would include the several provisions of the Constitution
7 and I would point out several because it is not only the Fourth
8 Amendment, it is also the powers granted to the President, the
9 long-continued practice which goes back to the origins of
10 the Republic, undoubtedly, to the necessities of the situation,
11 to the practicalities of the situation and when all of these
12 are taken into account, I think you are confronted with a
13 balancing consideration between the terms of the Fourth Amend-
14 ment, which were not absolute. They provide against unreasonable
15 searches and seizures. We have long been warned against press-
16 ing Constitutional doctrines to their logical extreme and when
17 you take into account all of the factors involved here, it
18 seems to me that you can come up with an appropriate construc-
19 tion of the Fourth Amendment and the circumstances in this
20 case which will adequately protect the rights of the defendant
21 by providing for disclosure in the first instance to the
22 district judge.

23 Q Before we pass to the next case, I would like to
24 say to Mr. Danzig that we appreciate very much, sir, your
25 representation of this indigent defendant. We are always

1 comforted that lawyers are willing to assign their attention
2 to devote to cases of this kind and we thank you. It is a real
3 public service.

4 Mr. Solicitor General, I want to say to you that we
5 likewise appreciate your representation to the Government in
6 this troublesome area which we know is very troublesome also
7 to you.

8 Q The question of standing in the Butenko and Ivanov
9 cases, have you looked up these records?

10 A No, I think not, but I think it is on disclosure
11 by the district judge himself. I don't think he will get to it
12 because he will immediately see there is nothing to it, by any
13 stretch of the imagination, relevant to the case.

14 Q But if you have a certain kind of standing here
15 you will never get to any kind of disclosure, or at least a
16 very limited disclosure.

17 A You might get a limited disclosure.

18 Q I would think you would get the standing question
19 first. If there is no standing there would be no question of
20 disclosure.

21 A If it turns out to be a standing proposition, you
22 may have to have more separate trials and you would know that in
23 advance, in which case there would not be any disclosure.

24 Q I suppose you would say unless A had standing
25 to object that if he is the defendant, unless he has standing,

1 you would not have to turn over any of the tapes, would you?

2 A Yes, I think that would be our position. No
3 matter what rule the Court makes, there is going to be an area
4 where the Government has to exercise some judgment.

5
6 (Whereupon, the above-entitled oral argument was
7 concluded.)