In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, et al.,

Respondents.

No. 70-153

Washington, D. C.
February 24, 1972

Pages 1 thru 85

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Washington, D. C.,

Thursday, February 24, 1972.

The above-entitled matter came on for argument at 11:43 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice

APPEARANCES:

ROBERT C. MARDIAN, ESQ., Assistant Attorney General, Department of Justice, Washington, D. C. 20530; for the Petitioner.

WILLIAM T. GOSSETT, ESQ., Penobscot Building, 27th floor, Detroit, Michigan 46226; for the Respondent Court.

APPEARANCES [Continued:]

ARTHUR KINOY, ESQ., Rutgers University School of Law, 180 University Avenue, Newark, New Jersey; for the Respondent Defendants.

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C O N T E N T S

[Afternoon session - pg. 16]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 70-153, United States against the District Court and others.

Mr. Mardian, you may proceed.

ORAL ARGUMENT OF ROBERT C. MARDIAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MARDIAN: Mr. Chief Justice, and may it please the Court:

This case arises from a criminal proceeding which is now pending in the District Court for the Eastern District of Michigan, in which the three defendants are charged with conspiracy to destroy government property.

One of the defendants, defendant Plamondon, was also charged with a substantive violation of destroying government property.

MR. CHIEF JUSTICE BURGER: Would you raise your voice a little, Mr. Mardian?

MR. MARDIAN: Yes, sir.

The indictments in this case resulted from the dynamite bombing of the offices of the Central Intelligence Agency building in Ann Arbor, Michigan.

During the course of the pretrial proceedings, motion was made for discovery of information relating to electronic surveillance that might be in possession of the

government. In response to this motion, the government served upon the movants an affidavit of the Attorney General of the United States, in which he acknowledged that one of the defendants, defendant Plamondon, had been overheard in the course of a surveillance authorized by him, and which he deemed necessary in the interests of the national security of the United States.

The affidavit stated that the disclosure of this information would be prejudicial to the interests of the United States.

In addition to serving the affidavit on the movants and filing it with the court, the government also submitted to the court for its in camera inspection the logs of the overhearings requested by the defendant. Included in that in camera submission, the government also offered the proof of the authorization of the Attorney General of the United States for the surveillance in question, conducted prior to the time of the bombing.

The in camera exhibit will show, which is now before this Court, that it contains a memorandum from the Director of the FBI to the Attorney General, in which he sets forth all of the electronic surveillances operated by the government at that time, approved by the Attorney General or by the former Attorney General.

Prior to submission, however, the government excised

the names of the organizations and individuals which were the subject of surveillance, with the exception of the organization which was the subject of surveillance in this case.

That in camera submission will also show a characterization in the form of a memorandum from the Director of the FBI to the Attorney General, the organization in question, its leadership and its illegal aims, and information relating to the fact that the organization was engaged in activities of a type which would ultimately lead to the destruction of the United States Government by force and violence.

This in camera submission would also show that the authorization of the Attorney General was for a limited period only, it described the premises where the installation surveillant was involved and indicated that the surveillance was subject to periodic review.

Based upon this in camera submission, the United States urged that the surveillance in question was lawful.

Q Periodic review by whom? The Attorney General or the Director of the FBI?

MR. MARDIAN: Pardon me, sir, I didn't get that.

Q You said it was subject to periodic review, and by whom?

MR. MARDIAN: By the Attorney General of the United States.

Q By the Attorney General?

MR. MARDIAN: Yes, sir.

Q Now, is this surveillance, this pattern of surveillance traceable back to the directive which President Roosevelt gave to Attorney General Jackson, in this area?

MR. MARDIAN: Yes, Mr. Chief Justice.

The government urged that this was a lawful surveillance, exercised under the jurisdiction of the President of the United States and --

Q Is that memorandum in the record?

MR. MARDIAN: Yes, Your Honor.

Q Of President Roosevelt?

MR. MARDIAN: Yes, Your Honor. As of --

Q Are the other memoranda in there, since then?

MR. MARDIAN: Yes, Your Honor.

Q And that's all here?

MR. MARDIAN: Yes, Your Honor.

The government's position, based upon this in camera submission and the affidavit of the Attorney General was that the surveillance was lawful as a reasonable exercise of the Presidential powers in the area of national security.

The District Court, after reviewing the in camera submission -- and I should point out in this regard that the in camera submission was not intended as a justification for the authorization, but simply a proof of the fact that the authorization had been granted by the Attorney General of the

United States, over his own signature.

The responding court, Judge Keith, held, based upon the affidavit and the in camera submission, that the overhearings should be disclosed to the defendants as a prelude to an evidentiary hearing to determine whether or not the information contained in the logs contributed in any wise to the prosecution of the defendant Plamondon.

It made this holding on the basis that the President of the United States was without authority to authorize a surveillance absent the judicial interposition of a warrant by a sitting Federal judge.

The United States immediately petitioned for a writ of mandamus in the Sixth Circuit Court of Appeals; the Sixth Circuit unanimously held that mandamus was an appropriate remedy, but, by a divided court, concurred in the judgment of the District Court on the basis -- in the words of Justice Edwards -- that there was not one phrase or word in the Constitution of the United States, the statutory law of the United States, or the case law of the United States that exempted the President of the United States from provisions of the Fourth Amendment.

We do not contend here, Your Honors, the President of the United States, either individually or acting through the Attorney General, is exempt from the provisions of the Fourth Amendment or is above the provisions of the Constitution.

We do suggest that this case puts into issue an intelligence function and procedure which has been sanctioned by six successive Presidents, acthing through twelve successive Attorneys General.

While the constitutional issue is grave, and the stakes, as far as the government is concerned, are high, the issue before the Court can be easily framed. Stated negatively, the question is not whether electronic surveillance is a permissible governmental tool, for now we find that the question is whether in the limited area of counter-intelligence activities the President of the United States may authorize electronic surveillance in the absence of a warrant by a member of the Judiciary of this nation.

In order to understand the case, to properly resolve it, I think we must first understand the factual setting, as distinguished from the other cases that have been before this Court.

This is not a case such as the Katz case, or the Black case, or O'Brien or Alderman, where electronic surveillance was authorized for the purpose of obtaining prosecutive evidence in a criminal proceeding. Nor is it a case, as in those cases, where the defendant was the target of the electronic surveillance which was authorized.

We have here, as we had in the Clay case, a situation where one of the defendants, unfortuitously -- or fortuitously,

depending upon the outcome of this case -- happened to dial a number which was the subject of the surveillance authorized by the President of the United States, acting through the Attorney General.

The government contends that, contrary to the distinction made by the lower court, that the President of the United States is imbued with two powers in order to carry out two responsibilities. Both lower courts distinguished the Clay case on the grounds that the power exercised in that case was an aid of the powers of the President in the area of foreign affairs, it related that power to defending the interests of the United States against the acts of a hostile foreign power.

The United States urges that these two powers are separate and distinct. The one power, the power of the President in the area of foreign affairs, is granted upon the fact that the President is the exclusive national organ of the United States in the area of foreign affairs.

The other power is granted upon the responsibility and obligation of the President to protect the security of the United States against its enemies, whether foreign or domestic.

Because counter-intelligence activities often involve both powers, some confusion has come to exist.

In counter-intelligence activities involved in the area of foreign affairs the purpose of the surveillance is to

permit the President of the United States to obtain the on-going intelligence information necessary to him, to compete on at least an equal footing with the information obtained by foreign powers with whom he has to deal.

In the area of national security, however, the intelligence that is sought is for an entirely different purpose, and the power, the responsibility are grounded upon the President's function in protecting the national security against the enemies of the United States, whether foreign or domestic.

Out of this confusion of dichotomy, the cases have discussed both powers as if they were one. And I think this case points up most eloquently the confusion which has existed between foreign and domestic intelligence.

The government contends that as a legal and as a practical matter you cannot distinguish between foreign and domestic intelligence unless you use the situs of the installation as the basis for making the distinction.

Both lower courts, however, were not confused with this problem. They did not reach it. The respondent court grounded its decision on the basis that the intelligence function exercised here was for the purpose of surveilling a domestic organization, and failed to distinguish the difference between surveilling for the purpose of obtaining intelligence information as distinguished from the nature of the organization

from which the intelligence was sought.

We suggest also that the constitutional authority of the President is not found in any one provision or any one article, but may be gleaned from the Constitution as a whole. And I speak now only of the constitutional authority of the President in the area of national security affairs.

Q Of course the Congress of the United States has a great deal of constitutional authority in the area of internal security and domestic affairs. I suppose, if your argument is correct, that Congress could delegate an agent of the Congress to do this investigative surveillance, could it not?

MR. MARDIAN: The Congress has undoubted authority in the area of national security, and I think, as pointed out in the amicus brief filed by the National Lawyers Guild and the Black Panther Party in Article 1, Section 15, the Constitution provides or states that the Congress shall provide for the calling of the militia of the United States in the event of insurrection.

The amicus brief asserts that because of this provision the Congress of the United States, distinguished from the President, has paramount authority in the area of the internal affairs of the country.

I would point out in that regard that the Second Congress, in furtherance of the provision of Article 1, Section

15, did provide for the calling of the militia and reposed that responsibility in the President of the United States. Those statutes enacted in the Second Congress now subsist in 10 U.S.C. 1031 and 1032.

Q Well, my question is directed to this: Is it your contention that only the President has this power through the appropriate Cabinet Officer, or would the Congress not also have at least equivalent power in this area, if you're right?

MR. MARDIAN: I would agree, Your Honor. In fact, I think in this area, as this Court pointed out in Colony Catering, the Congress of the United States has broad powers --

Q And broad investigative powers.

MR. MARDIAN: Yes. And in fashioning --

Q That's been held many times.

MR. MARDIAN: In fashioning a rule of reasonableness, under the Fourth Amendment.

Q I mean -- I'm not -- I mean, if you're right that the Executive, the Chief Executive can do this through his designated agent, Cabinet Officer, why couldn't Congress equally do this investigating surveillance around the country through its designated agent?

MR. MARDIAN: I think this type of activity, Your Honor, is peculiarly within the Executive functions. I would like to --

Q Under the Constitution you think it's entrusted

exclusively to the President?

MR. MARDIAN: I would not wish to state at this argument, Your Honor, that it is within the exclusive province of the President of the United States, but only that this type of activity is peculiarly within the Executive function, which I would hope to show.

Q Well, isn't the Constitution -- it expressly reposes the Executive function in the President, and Congress passes the laws and the President executes them?

MR. MARDIAN: Yes, Your Honor.

Q Wouldn't you -- I take it that you would, as Mr. Justice Stewart suggested, that Congress does have authority in this area, and I take it from your answer that Congress could forbid the President from doing what you suggest he has the power to do in this case?

MR. MARDIAN: That issue is not before this Court --

Q Well, I would -- my next question will suggest that it is. Would you say, though, that Congress could forbid the President?

MR. MARDIAN: I think under the rule announced by this Court in Colony Catering that within certain limits the Congress could severely restrict the power of the President in this area.

Q Well, let's assume Congress says, then, that the Attorney General, or the President may authorize the

Attorney General in specific situations to carry out electronic surveillance if the Attorney General certifies that there is a clear and present danger to the security of the United States?

MR. MARDIAN: I think that Congress has already provided that, and --

Q Well, would you say that Congress would have the power to limit surveillances to situations where those conditions were satisfied?

MR. MARDIAN: Yes, I would -- I would concur in that, Your Honor.

Q Well, do you think this affidavit squares with the Safe Streets Act?

MR. MARDIAN: As I tried to suggest, the affidavit was never intended as the basis for justifying the surveillance in question. The affidavit --

Q Well, why was it ever filed in the --

MR. MARDIAN: The affidavit was filed --

Q -- in the court?

MR. MARDIAN: The affidavit was filed with the movants. The justification, and again I suggest that it is only a partial justification, is contained in the in camera exhibit which was submitted to Judge Keith.

Q But the --

MR. MARDIAN: I think were the Attorney General to

have set forth anything, we think that --

Q Well, I'll put it to you this way: Do you think the affidavit, standing alone, satisfies the Safe Streets Act?

MR. MARDIAN: No, sir. We do not rely upon the affidavit itself but the in camera exhibit. I think the in camera exhibit will show, in the characterization of the organization involved, which was submitted to the Attorney General at the time the Director of the FBI sought authority from him to engage in the surveillance, that the organization involved was then engaged in activities which they hoped would ultimately result in the destruction of our form of government by means of illegal force.

MR. CHIEF JUSTICE BURGER: We'll resume at that point after lunch, Mr. Mardian.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: You may proceed, Mr. Mardian.

MR. MARDIAN: Mr. Chief Justice, may it please the Court:

At the noon recess, I was prepared to continue my response to Mr. Justice White, and I'd like to finish the answer to his question, if I may.

With respect to the in camera submission, Your Honor, the in camera submission to the court was intended for the purpose of satisfying the court as to the authorization of the Attorney General of the United States and the finding of the Attorney General.

I would like to point out in this regard --

Q Which finding? That's in these -- that is contained in the in camera documents or in this?

MR. MARDIAN: Yes, in the in camera document, which the Attorney General signed, which contained the authorization for this surveillance question.

Q I see.

MR. MARDIAN: I should like to point out --

Q Is that -- I take it that you would say that that authorization contains something of substance that's different than is in this affidavit filed in the court?

MR. MARDIAN: Yes, in the procedures then followed, which, you'll recall, this case arose out of a bombing that occurred in September 1968, and the indictment was returned in '69.

Q Well, I'll put it this way: If all the in camera document contained was what this affidavit contained, it would not comply with the Safe Streets Act?

MR. MARDIAN: I would concur in that, Your Honor. I think you will find that the authorization which was requested contained that information and was approved and signed by the Attorney General of the United States.

Q Well, maybe it contains information, but does it contain a certification of the Attorney General that the standards set down by the Safe Streets Act are complied with?

MR. MARDIAN: I think that is satisfied by the signature of the Attorney General approving the authorization based upon the evidence which is contained in the requested authorization.

Q You mean it doesn't express his conclusion in so many words, that this represents a clear and present danger to the United States?

MR. MARDIAN: The requested authorization states that it's requested because it does pose a clear and present danger to the structure and existence of government and the Attorney General approved that statement. Procedures now in existence

are different. It would contain an express finding to that effect, directed to the Director of the FBI.

I would like to point out --

Q Does it give any basis for it?

MR. MARDIAN: Yes, sir.

Q It gives a detailed basis for why it is?

MR. MARDIAN: No, I would say that it would be conclusionary, Your Honor, more than setting forth each specific fact. Keep in mind the decision-making process in this area is based upon the entire spectrum of intelligence information available to the Attorney General and not only the information supplied him by the Director of the FBI.

Q Well, is that subject to any review by anybody?

MR. MARDIAN: Limited judicial review, I would say, Your Honor.

Q Well, how limited?

MR. MARDIAN: In this area I think the review should -- is limited to a determination of whether or not there was a gross abuse of discretion by the Attorney General acting for the President in making the authorization.

Q Well, what could you find as a basis for determining that without facts of some kind?

MR. MARDIAN: Well --

Q Well, what do you need other than conclusions?

MR. MARDIAN: I would say, Your Honor, that this goes

right to the heart of the matter. In this area certain of the information which is available, all of the information which is available to the Attorney General of the United States and through him to the President is not available to each investigative agency of government.

There's an entire spectrum --

Q Is this available to the courts?

MR. MARDIAN: All that information is not made available to the courts.

Q Well, now, how does the court determine the constitutional rights of the persons who claim their right not to be surveilled?

MR. MARDIAN: We suggest that in the limited area, counter-intelligence activities of government, as distinguished from the situation where a warrant is sought for prosecutive purposes, that the Executive function in this area is somewhat limited, and that, for the President of the United States, acting through the Attorney General, or the Attorney General himself, or one of his subordinates, to lay before a sitting Federal judge the entire spectrum of information consisting of teletypes, letterhead memorandum, and all of the information that comes from not only the FBI but from other agencies, such as the Central Intelligence Agency, the National Security Agency, the Alcohol, Tobacco and Firearms Division of the Department of the Treasury, and other investigative agencies

of the government, all of these are reposed, all this information is reposed and filed with the Attorney General of the United States before he makes the authorization or grants the authorization requested.

Q Why couldn't that be shared with the Federal judge in camera?

MR. MARDIAN: I think, as we attempt to show in our brief, the function --

Q Well, let me ask you: Does the Federal judge take the same oath the Attorney General takes?

MR. MARDIAN: Yes, sir.

The function of the Federal judge in criminal cases is twofold: one, the judge must determine the need for the evidence sought; he then must make a determination as to whether or not there is probable cause to believe that a crime has been committed or is about to be co-mitted before he authorizes the warrant.

Now, the first of these decisions, as to whether the information is needed, such as in the area of national security, counter-intelligence information, if you please, it is the government's position that the magistrate, the sitting Federal judge is not in a position to determine whether or not the information is needed, much less appreciate, in many cases, the importance of the information sought. Unless there is to be exposed to that judge, along with any one of over 600

Federal sitting judges, all of the information available to the Executive in the area of national security.

In this connection, Justice -- rather Professor Telford Taylor addressed himself to the problem in connection, not with national security intelligence, counter-intelligence, if you please, but with respect to the authority of the judge and the ability of the judge to issue a warrant in an ordinary criminal case.

And if I may I'd like to quote from Professor Telford Taylor. Not that I ascribe to his views with respect to warrants issued in criminal cases, but he says: What proper business is it of a judge and what experience or facilities does he have that will enable him to decide whether or not surveillance of a particular type if warranted in a particular case?

He is pointing out, I think, the same thing that was pointed out in the Report of the Committee of Privy Counselors, when they addressed themselves to this question in England. The question there was whether or not the power to issue warrants for electronic surveillance should remain in the Secretary of State or should be reposed in the Federal Judiciary.

Q Of course the Privy Council isn't bound by the Fourth Amendment.

MR. MARDIAN: No, but I think the Privy Council Report

is acutely aware of the right of privacy that exists in England, as much as it exists in the United States. And it addresses itself to the question of whether or not the granting of this authority, counter-intelligence cases, is in the best interest of the right of privacy of the individual. And it concludes that it is not.

It concludes, in its report, there will be a weakening of the process, that there will be a diffusion of authority to any one of the Federal Judiciary or the judges in England, rather than reposing that responsibility in one man and one man alone.

And we would suggest that the interests of privacy of the American citizen is better protected in limiting this authority in the area of electronic surveillance in counter-intelligence cases to one man, the Attorney General acting for the President of the United States, rather than to proliferate it amongst all of the Federal sitting judges in the United States.

And we say that not in connection with those cases where the judicial process is one of determining probable cause, but only in those cases and in the limited area of counter-intelligence where the decision-making process requires a judgment as to the need for the intelligence information sought. And we would suggest in this regard, also, that information obtained by the government for counter-intelligence purposes

in this area is not used for prosecutive purposes, and is not sought for prosecutive purposes.

Q Well, I understand the claim here is the petitioner -- I mean the respondents, rather the people that were before the court, the respondent court, take the position that it was, and they wanted to find out whether it was. Am I right?

MR. MARDIAN: I believe that that is their contention, but I think that the in camera exhibit will show beyond question that the authorization in the case was totally unrelated, and the information obtained was totally unrelated to the crime for which these defendants were indicted.

Q Does it show that it wasn't used?

MR. MARDIAN: Yes, sir. I think an in camera examination will disclose, as the Fifth Circuit found in the Clay case, that the information contained in the logs could not, in any wise, have --

Q Well, the Clay case was foreign espionage, wasn't it?

MR. MARDIAN: The burden of the court, however, in both cases is the same. We do not have, as we had in Alderman, as was described by counsel in that case, caseloads of electronically monitored conversations which would require -- which the court would have to examine in juxtaposition to the skeletal averments of a criminal indictment. We have, as the

counsel in the Alderman case suggested, not even sheaves of paper, something less than sheaves of paper. Not unlike Jenks Act materials, not unlike grand jury minutes, which this Court, as could the Circuit Court and the District Court, examined to determine that the overhearings were totally unrelated to the crime for which these people were indicted.

And I think that beyond question the in camera exhibit will show that the purpose of the surveillance was for the sole and limited purpose of obtaining counter-intelligence information as distinguished from prosecutive evidence in a criminal case.

Q Well, this argument you make, even on the assumption that the surveillance was illegal?

MR. MARDIAN: I think it would apply equally, yes, sir, Mr. Justice.

Q Even if the surveillance were deemed to be an illegal one by this Court, that it nevertheless didn't taint these proceedings?

MR. MARDIAN: I think in the --

Q And you say the taint should be considered in camera?

MR. MARDIAN: I think in the setting of this case the burden would be no greater than the burden of the court, the Fifth Circuit Court, in the Clay case.

Q And that position, you don't think is -- on its

face it seems inconsistent with Alderman?

MR. MARDIAN: I don't see it as inconsistent with Alderman. I think the facts of the Alderman case are far different than the facts in this case. In the Alderman case, as counsel pointed out, the surveillance was authorized for the purpose of obtaining prosecutive evidence to be used in a criminal case, and it was directed against the defendant. And, as in that case, I would assume -- I didn't look at the record -- that there were literally boxloads of electrically monitored telephone conversations.

In this case we have a situation, as in Clay, where, as I said, the defendant unfortuitously -- or fortuitously, depending on the outcome of this case -- happened to call the wrong number. And I think the in camera examination would disclose that fact.

Q I take it from your brief you also argue that nothing in the Safe Streets Act precludes this kind of an argument?

MR. MARDIAN: I would -- I hope to get to that, and I would concur that it doesn't.

I would like, if I may, to turn briefly to answer the assertion of lack of constitutional authority.

And I think, in this regard, we must recognize that the constitutional authority of the President must be gleaned from a reading of the entire Constitution itself. And I should

like, if I may, to address myself very briefly to the provisions of the Constitution, which the government deems applicable to this case.

Q Before you do, let me ask you: do you rely on the Safe Streets Act at all as an authorization?

MR. MARDIAN: Yes, sir. Yes, Your Honor.

Q So that even if the President, absent authorization by the Congress, didn't have independent constitutional power to do this, your argument is that the Safe Streets Act authorizes him to do so?

And the Constitution would permit the Congress to authorize him to do so?

MR. MARDIAN: In the setting of this case, I would rather argue, Mr. Justice, that we read the Constitution along with the statutory provision, and that in itself would be sufficient for the Presidential authority in this area.

I think absent the constitutional enabling act, the congressional enabling act, that we would have a more difficult case, but I think in that case, as I hope to show, the President would have the constitutional authority in this limited area to engage inelectronic surveillance for counter-intelligence purposes.

I would like to point first to the Preamble to the Constitution, which sets forth the purpose of this Republic.

One of the primary stated purposes of the Preamble

is to insure domestic tranquility. The insurance of domestic tranquility, we would submit, involves an Executive function as well as a Legislative and a Judicial function.

Article II, Section 2, provides and it reposes the Executive function of the United States in the President of the United States. And Article II also requires that the President take an oath that he will, to the best of his ability, preserve, protect, and defend the Constitution of the United States.

I submit in this regard that the protection of the Constitution, or the oath to protect the Constitution is not an oath merely to protect the document itself, but to protect the principles under which the Constitution was adopted, and the rights guaranteed by that Constitution.

Q Do you think that argument helps you in this case?

MR. MARDIAN: Yes, sir, I think I would hope to show that it does.

In Article II, Section 2, the Framers of the Constitution designated the President of the United States as the commander-in-chief of the Army, of the Navy, and of the militia of the several States, when called into active service by him.

In Article II, Section 3, it enjoins the President to take care that the laws of this nation are faithfully executed.

Each of these, we submit, is an executive function.

This Court, in In re Nadel, in passing upon Article II, Section 3, stated, and I would like to quote from that: The President's duty to take care that the law be faithfully executed extends not merely to the enforcement of specific acts of Congress, but to the enforcement of the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all other protection implied by the nature of our government under the Constitution.

Article IV, Section 4, which is oftentimes overlooked, carries out the promise of the Preamble of the Constitution. That Article provides that the "United States shall guarantee to every State of the United States a Republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive, when the Legislature is not in session, against domestic violence."

Now, I have previously alluded to Article I, Section 8, of the Constitution, which provides that the Congress shall provide for the calling forth of the militia to execute the laws of the nation, to suppress insurrections and to repel invasions.

Now, as one of the briefs pointed out, this power is in Congress. But Congress has exercised that power. It exercised it in 1792, in the Second Congress. It provided, in

what is now 10 U.S.C. 1031, that the President could call the militia of the several States into Federal sezvice and authorizes him to use such force as he deems necessary.

And this is a quote from the provision of the Act"as he considers necessary to suppress insurrection."

This is an Executive function reposed in the President of the United States.

332 provides that whenever the President considers it unlawful obstructions, combinations or assemblages, or rebellion against the authority of the United States, make it impractical to enforce the laws of the United States in any State or Territory, by the ordinary course of judicial proceedings he may call into service the militia of any State and use such of the Armed Forces as he considers necessary to enforce those laws or to suppress rebellion.

Section 333 of 10 U.S.C. provides that the President may use the militia or the Armed Forces, or both, or any other means and "shall take such measures as he considers necessary to suppress in a State domestic violence, unlawful combination, or conspiracy that seriously interferes with the execution of the laws of the United States."

We would submit, in this regard, that Article IV, Section 4 of the Constitution makes no distinction with respect to Presidential powers as they pertain to invasion or domestic violence.

Now we turn to the Omnibus Crime Control and Safe Streets Act of 1968. In that Act, in subsection 3 of 2511, there is this language: "Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow by force or other unlawful means, or against any other clear and present danger to the structure or existence of government."

If there be any doubt as to what"any other means" means as the phrase is used in that statutory provision, it is dispelled by the next following sentence:

"The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

We suggest, Your Honors, that in the exercise of this function by the President of the United States there is, of course, a discretion vested, and whenever a discretion is vested, there is of course the chance that the discretion will be abused.

But this is the very essence of our government.

I would suggest to the Court that at the time of our Continental Congress, at the time of the Constitutional

Convention, at the time this very Constitution was enacted, there was serious question as to whether or not this Court had the power of judicial review.

It was asserted at that time, when this Court consisted of five members, that a majority of that Court could, if it had the power of judicial review, substitute its judgment for the judgment of both Houses of Congress that the people of the United States had elected.

Justice Marshall answered the question, but I think Alexander Hamilton answered it even more eloquently, in the Federalist Papers, No. 80, in which he said: To argue that the members of the Court substitute their judgment for the will of the people would argue that there ought be no Court.

Q Another Justice by the name of Marshall sort of took care of all that, didn't he? Chief Justice Marshall.

MR. MARDIAN: Chief Justice Marshall, I believe answered the question in the same way.

If we look to the Constitution of the United States, I doubt if we can find one phrase or one word which reposes in the Court the power of judicial review. Justice Marshall found that it was inherent in the Constitution itself --

Q What about -- you keep ducking the Fourth Amendment. Are you going to get to it?

MR. MARDIAN: I'm sorry, Your Honor?

Q The Fourth Amendment.

MR. MARDIAN: We suggest in this regard that we are not asking for an exemption of the Fourth Amendment. We do not suggest the President is above the Fourth Amendment. We simply suggest that in the area in which he has limited and exclusive authority, the President of the United States may authorize an electronic surveillance, and in those cases it is reasonable.

I would suggest in this regard that the Fourth Amendment does not prohibit all searches and seizures, but only those which are deemed --

Q But is it possible, under your theory, that the President could make an unreasonable intrusion into the private life of a citizen of this country?

MR. MARDIAN: I think that the abuse of discretion to which you allude is possible not only in the executive function but in the Judicial as well as the Legislative.

Q I'm not talking about the Judicial function, I'm talking about the Executive.

MR. MARDIAN: I think that --

Q And I understand your position that if the President decides it's necessary to bug John Doe's phone, that's it. There's nothing under the sun John Doe can do about it.

MR. MARDIAN: Within the limited procedures prescribed by the statute under which he acts.

Now, if he chooses to violate that statute, he might

well choose to violate his oath. This is an attribute of our government which exists and has always existed. But I would also suggest in this regard that this is not an unbridled discretion, we are here before this Court for the Court to examine whether or not, in this case, there was an unbridled discretion or an abuse of that discretion.

If I may, Your Honor, I would like to reserve what time I have left for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Mardian.

MR. MARDIAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Gossett.

ORAL ARGUMENT OF WILLIAM T. GOSSETT, ESQ.,

ON BEHALF OF THE DISTRICT COURT AND JUDGE KEITH

MR. GOSSETT: Mr. Chief Justice, and may it please the Court:

By designation of the State bar, as you know, I'm here to represent the respondent in the mandamus proceeding in the District Court of Michigan and Judge Keith of that court.

Mr. Kinoy and I have agreed to a loose arrangement for dividing the argument here, and in addition to supplementing my argument on the main issue, he will, I think, deal expressly and especially with the matter of the ultimate decision.

We do not intend, however, to suggest or discourage any questions of the Court from either of us on any point.

I want to come soon to the government's papers, but not too soon, because I'm very clear on one thing: the government's case has many infirmities, fundamental infirmities, that go, that transcend the form of their papers.

There may have been controversy in this Court in the past about the scope and about the wisdom of the recognized exceptions to the warrant requirement. But, prior to this case, there has never been a serious challenge to the basic rule that ordinarily searches and seizures must be made pursuant to duly issued warrants. And if they're not, they're unreasonable.

Indeed, the government for forty years has admitted repeatedly that the fruits of electronic surveillance,the fruits of unauthorized searches and seizures are not admissible in evidence. All during this period to which Mr. Justice Marshall referred, when the Department of Justice was operating under Presidential authority, the government admitted during all that period that the fruits of their searches was not admissible in evidence.

Q Of course during a great deal of that period, Mr. Gossett, that was the regime of Olmstead and of Goldman, was it not, so that the problem was not a Fourth Amendment problem during the lion's share of that period, or a great deal of that period.

MR. GOSSETT. Very true.

Q And that what was involved was a provision of the

Federal Communications Act, not the Fourth Amendment. Am I wrong about that?

MR. COSSETT: You're quite right, Mr. Justice Stewart, and under the interpretation of that Act by the Attorney General the proscription was against disclosure. And all the Attorneys General admitted that the disclosure point, that they could not disclose, and if they disclosed the fruits, there was a violation of the Act.

But during all of that period the Attorneys General sponsored many bills in Congress to secure the right to wiretap. And all of those bills were either defeated or withdrawn because Congress was concerned about the definition of war power, about national security, and they were afraid of abuses. And so not until 1968 was legislation adopted that overrode the 1934 Act.

Obviously this case, in this case the government does not claim that the electronic search here falls within any of the recognized exceptions. It seeks instead, as it did in Katz, a new exception. Indeed, it seeks for all searches that the Attorney General may characterize or label as national security, an exemption from any meaningful judicial supervision, either before or after the search.

Thus, the government, in effect, presents a startling proposition. It is that all so-called national security searches and seizures are nonjusticiable. They simply are

beyond the reach, beyond the competence of the courts. They are for the Attorney General, the Executive alone.

The wiretape here involved was ordered because, and only because, the Attorney General unilaterally determined that it was reasonable to gather domestic intelligence information being necessary, as he put it -- and I want to be awfully careful about his language -- "to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government."

Q What use, Mr. Gossett, is the government now undertaking to make of these disclosures, if any?

MR. GOSSETT: The government claims in this case that the -- claims that in all cases of national security, Mr. Chief Justice, that the fruits of wiretaps secured in connection with the so-called intelligence information gathering should be admissible in evidence in a criminal case.

That's their position.

And they are -- they've set up here a conflict between the physical security of this country and the right of these defendants to privacy. That's not the decision the District Court made; that's not the decision that the Court of Appeals made; and that's not the decision before this Court -- that's not the question before this Court.

The question before this Court is whether the Fourth Amendment is going to be protected, whether the protection of

the Fourth Amendment is going to be respected, whether the people are going to be protected against arbitrary power of government. That's the decision that the Court of Appeals made and that's the decision that we hope this Court will make.

In preparing his affidavit in this case, the Attorney General did not even comply with the statutory standard on which he himself relies, established by Congress in 1968. They say specifically, not only in their main brief but in their reply brief, that that's the standard.

Now, let me direct -- let me invite the Court's attention, if I may, to the record here.

There's some confusion, I don't know how the Court can be other than confused about the record in the case here.

May I direct your attention to -- invite your attention to the -- page 3 of the main government brief first. This is what the Attorney General's affidavit said about the documents, after they say that the wiretaps were employed for the purposes that I have stated; then in paragraph 4:

"Submitted with this affidavit is a sealed exhibit containing (1) the records of the intercepted conversations, (2) a description" -- let me explain that the lower court, to be sure that you understand this, the lower court's direction here is only that the Plamondon conversation be disclosed; nothing else, just the Plamondon one, which the government says was fortuitous: he dialed the wrong number.

"(2) a description of the premises that were the subjects of the surveillances, and (3) copies of the memoranda reflecting the Attorney General's express approval of the installation of the surveillances."

Now, next let me suggest that we go to page 9 of the government's reply brief. They broaden the scope there a bit. They say: Respondent District Judge urges that -- complains about the standard employed here, and we make the point that they don't have to apply to the standard, which we certainly do. I'll come back to that.

The affidavit, however, says the government, was not authorization to the surveillance. In response to the motion, under Rule 16, the affidavit was prepared and transmitted to the court together with the in camera submission. "This submission contains (1) a signed authorization of the Attorney General, (2) documents characterizing the illegal activities and names of the organizations in question, including information relating to the means by which it intended to achieve its aim, (3) a summary inventory of prior monitored conversations, (4) a document relating to the previous authorization of the prior Attorney General, (5) description of the premises involved in all overhearings of the defendant respondant Plamondon. Those documents and not the affidavit are the proper basis for determining the ground upon which the Attorney General acted."

Third, let us go to page 30 of the government's main brief, if I may. There's a footnote there, after -- footnote 13 on page 30, "The defendant, Plamondon, was not the subject", and so forth.

The next paragraph: "We have lodged with the Clerk of this Court for its in camera consideration the same exhibit we submitted to the Court of Appeals for the Ninth Circuit in the Ferguson case, which involves the same issue as the present case and is now pending on a petition for writ of certiorari."

-- That sentence ought to be read as carefully as it was written. It does not say that the material in the exhibit was in the record of the Ninth Circuit case. The fact is that it is not in the record of the Ninth Circuit case. It was submitted to the Ninth Circuit, and the Ninth Circuit, we understand, we're reliably informed by a former Deputy Attorney General who represents Judge Ferguson out there, that that material was submitted by the government, they were requested to make a motion. They made a motion; the motion has not been decided.

So that material, on which the government says that it relies for the authority of the Attorney General for the considerations that motivated the Attorney General, is not in the record of this case, was not in the record in the Sixth Circuit, and not in the record in the Ninth Circuit.

So how does it become material? It is not available to us.

And let me point out that on page 8 of the reply brief of the government, they make some vague statements. They have always taken the position; they took the position in their affidavit, in their memorandum of law in opposition to the motion to suppress in the lower court; they took the position in the Court of Appeals; and they took the position in their petition for a writ of certiorari in this case, that the issue here was one of domestic security, domestic surveillance, domestic organizations.

Now they say -- and this is as far as they go, and this is as much as they say, on page 8 -- "the fact that an organization is domestic does not mean that its activities cannot involve foreign intelligence operations. A domestic organization, for example, may have a large number of significant foreign contacts and associations that may influence, may have a large number, and may influence our need to control this domestic activity. Similarly individuals connected with the domestic organization themselves may have such foreign ties."

And then they go on to say that "it's practically an impossibility to find distinctions in such an organization unless one uses principal geographic sites", and so on.

The District Court did not consider this problem, but grounded its decision on the fact that the organization

as distinguished from the intelligence sought was wholly domestic.

The point is that the argument was not made before the District Court, was not made in the Court of Appeals, was not made in the writ of certiorari to this case. And there is no assertion now in any document, not even in this reply brief, that this organization, this "domestic organization" has foreign ties nor is influenced by foreigners. There's no such statement.

And so I don't know how this Court can base its decision in this case, on the adequacy of the papers, on any such record.

Now, if I may, I want to read the rest of the affidavit, the rest of the footnote on page 30 -- 31, starting at the bottom of page 30:

"We think these records demonstrate that any characterization of the organization in question as 'domestic' is unsupportable."

Q I haven't found you yet, Mr. Gossett.

MR. GOSSETT: Page -- it's the main brief of the government, page 30, the last paragraph of the footnote, beginning on page 30, Mr. Chief Justice.

"We think these records demonstrate that any characterization of the organization in question as 'domestic' is unsupportable. For example, over a fourteen-month period,

521 telephone calls were made from this installation to foreign and overseas installations and another 431 calls, the contents of which deal with foreign subject matter, were placed to domestic installations."

Now, that's the sole basis for the government's claim that there's any foreign intelligence involved here.

And I -- who characterized this? It says, "any characterization of the organization as 'domestic'"; who characterized it as domestic? Why, it's perfectly clear, the Attorney General of the United States characterized it as domestic.

And he's never, in any paper, stated otherwise, or stated facts that were available to us as a basis for any other characterization.

Q I suppose there's a risk, Mr. Gossett,from tying ourselves down to semantics here. How would you characterize a trade mission of a foreign country that was being used as a source of intelligence gathering in this country?

MR. GOSSETT: Well, I think that that would depend on the facts and circumstances, and I think that's the very purpose of the warrant requirement, to set out those facts and circumstances, have counsel ex plain to the court what the significance of the relations were, and have the court perform its constitutional role to determine whether the intrusion is proper, the extent of the intrusion, and so on. All the

requirements of whether there's probable cause for the intrusion.

Q And that would mean, probably, if they were going to have surveillance of an embassy, they would have to do the same thing, then, in your view; is that correct?

MR. GOSSETT: This Court has reserved expressly the matter of the power of the President in the foreign field. We don't have it involved here. I think the President has -- perhaps has extraordinary powers in the foreign field. But, even there, let me make the point, if I may:

If I could ask you to turn to our brief, page -- in the Appendix of our brief, we set out there Section 2511(3).

Q Where are you, Mr. Gossett?

MR. GOSSETT: The Appendix of the blue-covered brief.

Q Thank you, sir.

MR. GOSSETT: It's from the Omnibus Crime Control and Safe Streets Act of 1968, 2511. This language was obviously very carefully drawn, and it appears in a statute that is very carefully drawn, that for the first time in the history of this country provides for electronic surveillance with court order -- with a court order.

And provides that in case of national security searches -- national security searches and seizures, that the government may proceed without a court order, provided that within 48 hours after the surveillance starts that they get a

court order, apply for a court order. That's the express provision of Congress with respect to national security cases.

Now, 2511(3): "Nothing contained in this chapter or in section 605 of the Communications Act of '34" -- now we deal first, I think, with the foreign power -- "shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."

Three times they use "foreign", the word "foreign": foreign power, foreign intelligence information.

Now, the next sentence, I think, deals with the domestic side:

"Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary" -- same language -- "to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."

Now, why didn't the -- why -- quite aside from the facts that are not available to us, why could not the Government for the United States follow the prescribed language with

respect to domestic activities?

The word "intelligence" is not used; but the word "force", and the words "unlawful action" and "clear and present danger". None of those words are used, they haven't been used, not only in the affidavit, they haven't been used in any document in this case.

Q Mr. Gossett, suppose a foreign power, hostile foreign power, unfriendly foreign power, engages, hires, employs people who live here, whether citizens or not, and they engage in this type of activity. How would you think that they would be -- or how would you characterize them, as part of a foreign or as part of a domestic operation?

MR. GOSSETT: I think if they were employed by foreigners, they might be part of a foreign operation. But let me --

Q Then they'd fall under the first part of the statute?

MR. GOSSETT: I think so. I think so, and we're in the dark here, Mr. Chief Justice, about the facts; all we know is that the Attorney General said, and said to the District Court and to the Court of Appeals: this is a domestic organization. Nothing about foreign activities, and the most they've said is that foreign activities may be involved.

That -- in the domestic organization, not this one, but in domestic organizations, foreign activities may be

involved.

May I just read -- call your attention to the last sentence in that very carefully drawn paragraph?

Q You're still on 2a?

MR. GOSSETT: I'm still on the Appendix -- yes, on 2511(3).

"The contents of any wire or oral communication intercepted by authority of the President" -- this was read by Mr. Mardian, but I read it differently than he does; I see some significance in it that he didn't point out -- "in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceedings only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power."

What does "reasonable" mean? Well, the Committee reports are quite clear on the subject. They interpret "reasonable" just as this Court interpreted it in Camara and in Katz and in Burke. They say "reasonable" -- the test of reasonable, the standard of reasonable shall be the probable-cause test under the Fourth Amendment. They make it very clear.

So when they use -- the Congress used this language, they meant that in a domestic situation, if the government expected to use the evidence, the fruits of the electronic surveillance in evidence, then they must -- it must be reasonably obtained. And that means under the Fourth Amendment

probable-cause test.

They say, the government says the Fourth Amendment does not prohibit all searches and seizures, but only unreasonable ones. The test for determining reasonableness, they say, is to weigh the competing interests involved. And they then purport to balance the competing interests, and they say, they find, naturally, that the government interest in protecting national security, the physical security of this country outweighs the invasion of personal rights resulting from the surveillance.

Of course it ignores the essential second step in the procedure, and, as I say, there's an unfair weighing, if they're weighing the national security against the rights of these three defendants.

But the determination of whether a search is unreasonable involves more than a weighing of competing interests, the process must begin with, to quote this Court in Camara -- I've never known the correct pronunciation; I hope it's "ca-mar-a" -- one governing principle justified by history, by current experience that has consistently been followed, that except in certain carefully defined classes of cases a search of private property without proper consent is unreasonable, unless it has been authorized by a valid search warrant.

The warrant requirement is not merely one method of

assuring a reasonable search, it's crucial, and it's generally indispensable.

Probable cause, said the Court in Camara, is the standard by which the constitutional mandate of reasonableness is tested. And the burden, the burden is on those seeking an exemption from the warrant requirement to show a need for it; not just a need to search but a need to search without a warrant.

Now, of course there's a governmental interest. Who would dispute that there's a governmental interest in protecting the fabric of society itself, as the government puts it in its brief? But that's not the interest at stake in this case.

In Camara, as you will recall, an almost identical argument was made in principal: "That the general health and safety of the entire urban population is dependent upon enforcement of minimum fire, housing, and sanitation standards." And thus it was claimed that required systematized inspection of all physical structures without a warrant.

But, as this Court noted, the argument missed the mark. The question was not whether these inspections may be made, but whether they may be made without a warrant. And so it is in this case. The warrant requirement is no mere formality.

We agree with the Attorney General that the President is responsible for insuring our system of government, as a vital

entity.

Indeed, his duty is even greater than that, greater and more formidable. He's sworn not to protect the government as such, but to preserve, protect, and defend the Constitution of the United States. But his powers must be exercised, and the need for information satisfied through constitutionally proper means.

And the Constitution limits the President, even in his most awesome responsibilities. That this Court has held in a number of cases.

And we don't subscribe to the inherent power argument. The government made it in the lower court and in the Court of Appeals. It withdrew from it in its main brief in this case, and now it seems to be back to the inherent power argument. But we think that --

Q What if Congress, in a clearly expressed statute, said that electronic surveillances shall be carried out only with a warrant, but that the warrant may either be obtained from a magistrate or from the President of the United States? And in a particular case the President issues what's called a warrant, pursuant to the statute: "I find there's probable cause to do so-and-so". He issues the warrant.

MR. GOSSETT: I think the Fourth Amendment contemplates and provided for judicial process, Mr. Justice. I don't think that would be judicial process. I think that what the

government -- what the generations of Americans were talking about, who formulated the Fourth Amendment, was neutral magistrate, a detached magistrate. And the President is a political man, and so is the Department of Justice, and all those that work for him; they're politicians, and they should not be given the power to determine how much and how long and how great will be the intrusion of private citizens in this country.

That's what the government is arguing for in this case.

Q You would say that would be unreasonable? It's unreasonable to trust the President of the United States as much as you trust a District Judge?

MR. GOSSETT: I think so.

Q Well, you say it doesn't fit the constitutional definition of a warrant, is that it?

MR. GOSSETT: I think it does not, no.

Q No matter how much you may trust the individual?

MR. GOSSETT: That's right. I may trust this Administration. I'm talking about a long -- over a period.

Q Right. But a warrant, within the constitutional meaning of that, as just a matter of definition, means one issued by a neutral and detached magistrate --

MR. GOSSETT: This Court has so held --

Q -- not by either one of the Parties.

MR. GOSSETT: Yes, sir.

Q I take it, when you speak of the political branches, branch, you would include the Congress as a political branch as well as the Executive?

MR. GOSSETT: I would, indeed, except that I think Congress has the power to set up standards from which the --

Q But, I take it you would agree, or that it would be your view that Congress could not issue the warrants?

MR. GOSSETT: Could not pass upon the standards; it could pass upon the facts, I agree, yes, sir. And they have done --

Q They could define the standards but they couldn't issue the warrants?

MR. GOSSETT: Yes. That's our position. And, of course, they have set up standards in the 1968 Act, and I think that Act has gone a long way to solve some of the problems here.

And the Act deals with such crimes as espionage, sabotage, Presidential assassination, treason; all of these things that the government says are unsafe for the courts to deal with, they're too complicated. They can't deal with these matters, they must be dealt with by the Executive in his -- with his great wisdom and knowledge and background in this matter; they must be dealt with by the Executive.

Q Well, are you arguing, Mr. Gossett, that whatever

the scope of inherent power prior to the 1968 Act, that the 1968 Act has now spoken to the subject and controls? Is that your argument?

MR. GOSSETT: So far as Congress is concerned, it does. It has. And I think Congress has left open a couple of questions, with deference to decisions of this Court, and the position of this Court in certain cases.

But so far as securing wiretaps, wiretapping, and intruding into the lives of private citizens in this country, I think Congress has spoken and has stated the policy very precisely, and elaborately. The language was very carefully drawn.

Thank you, Mr. Chief Justice.

Q Did the -- before you sit down, Mr. Gossett -- did the District Judge look at this in camera submission?

MR. GOSSETT: He did, and I'm glad you mentioned that because he found expressly, precisely, that having looked at it, that he could not make a determination as to the significance of it from a prosecutorial benefit point of view. He could not make a determination.

Q Is that in the record?

MR. GOSSETT: It's in the record. It's -- I'm sorry, I don't have the page before me; but it's the -- the official citation is 444 Fed. 2d, at page 668.

Q Yes. And did the Court of Appeals look at it?

MR. GOSSETT: The Court of Appeals, yes, sir.

Pardon?

Q Both the District Court and the Court of Appeals looked at the --

MR. GOSSETT: No, the District Court made no such finding; the Court of Appeals did.

Q Yes, I see. I understand.

MR. GOSSETT: And we don't really know what was before the Court of Appeals. We have one list of documents, as I pointed out.

Q Thank you.

MR. GOSSETT: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Kinoy.

ORAL ARGUMENT OF ARTHUR KINOY, ESQ.,

ON BEHALF OF THE DEFENDANT-RESPONDENTS

MR. KINOY: Mr. Chief Justice, and members of the Court:

I rise before this Court to represent the three individual respondents: John Sinclair, Lawrence Plamondon, John Forrest.

But, as the Court of Appeals has stated so powerfully in the opinion before this Court, the thrust of this case now goes far beyond the rights and liberties of these three young men.

The government has seen fit to use this case as a

vehicle for propelling a claim of executive power so omninous in its implications and sweeping in its dimensions that it has transformed this appeal into a case which, as this Court has said, touches the bedrock of our political system.

Mr. Mardian has seen fit this morning to call upon the authority of the great Chief Justice in Marbury. I would suggest to the Court that in the words of that Chief Justice this case has become one of those rare cases of peculiar delicacy, which call for the historic role of this Court as the ultimate interpreter of the Constitution.

Now, the considerations, I suggest to the Court, awesome and foreboding, which permeate the opinions of the District Court and the Court of Appeals, arose out of an openly expressed and frank attempt by the Executive to use this case to obtain the imprimatur of this Court for a program of domestic -- and I stress that word -- domestic espionage and surveillance of political opponents unprecedented in our history.

Mr. Gossett has exposed fully, I believe, the essence of the Executive's claim of executive power to engage in wholesale wiretapping of American citizens without regard to the Fourth Amendment commands of prior judicial approval by a neutral magistrate, the very point of the First Amendment -- of the Fourth Amendment, which this Court has taught so recently, in Coolidge, in Camara, without showing of probable cause or

the necessity of particularity, whenever in his sole and unchallenged judgment the ideas, associations, or political activities of these citizens may constitute an attempt -- and here I use his words -- to subvert the existing structure of the government.

Now, as Mr. Gossett has pointed out, and in the words of Judge Edwards in the Court of Appeals for the Sixth Circuit, this would, to place it bluntly, erase the Fourth Amendment from the domestic life of this country, the Amendment which this Court has taught is the embodiment of fundamental principles of liberty.

But I would like to suggest to the Court that the most serious consequences which would flow from this Court's placing its imprimatur upon this claim of power would be the stifling of the political freedoms guaranteed by the First Amendment, the continued vitality of which rests -- there's been a great deal of discussion today about the security of the Republic and the security of this government.

Well, Mr. Mardian did not include in his discussion to the Court the deepest teachings of this Court that the security of the Republic basically depends upon preserving the essence of the system of political freedom, those great words of the Chief Justice, Justice Hughes, in DeJonge: preserving the essence of the political freedoms of the country.

Now, the fear of excessive and uncontrolled Executive power, which permeates the Court of Appeals opinion, and the opinion of the Respondent District Judge, the fear of this power to sweep aside Fourth Amendment protection -- against what? Against warrantless general searches and seizures.

I suggest to the Court that not since the days in 1761 when, before a Massachusetts court, James Otis pleaded a case, has a more classic general search ever come before this Court. Here you have a search of fourteen months' duration, by the government's words -- fourteen months' duration, over 900 telephone calls involving, Lord knows how many thousands of people who, as Mr. Gossett said, by mistake dialed a number.

Now, this fear which is reflected in the Court of Appeals opinion, of this unprecedented power, is based not only on the contemporary European lessons of tyranny this country is not supposed to reflect, but is based, I suggest, on the most important of our own experiences as a people. That the essential teaching of our own history has been that arbitrary general searches and seizures always, but always -- and that is the teaching and the meaning of the essence of our experience as a people, is the path to the assertion of tyrannical control over the lives of people.

And this, I suggest to the Court, is the brilliant heart of the Court of Appeals opinion which is here for review by this Court.

The concept of the Court of Appeals that beyond doubt the First Amendment is the cornerstone of American freedom, and the Fourth Amendment stands as the guardian of the First.

And this reflects the teaching of this Court in Marcus, that the Bill of Rights itself, the Fourth Amendment was fashioned against the background of knowledge that unrestricted power of search and seizure was an instrument for stifling liberty of expression.

Now, the power which the Attorney General states here would legitimatize a widespread dragnet of a secret surveillance of domestic political opposition, of which the present record, Appendix A to our brief, for example, is but a tiny preview. Already the subjects of the Attorney General's suspicion -- and I use that word advisedly -- fall on leaders of the AntiWar Movement, black militants, Catholic activist pacifists, advocates of youth culture.

But what is the deep danger to the country that this claim represents?

As formulated here this morning and in the briefs submitted to this Court, that claim of power can include any one who speaks out. Now, I put it bluntly to the Court, that this is not an exaggeration.

I put to the Court the example of the recent suggestion from high quarters in the Executive Department, that critics of the proposals made by the President of the

United States in respect to the Vietnam War -- and I use their own words -- are consciously aiding and abetting the enemy of the United States.

That was the Chief of Staff of the White House, two weeks ago.

Now, I suggest to the Court, would these critics be included within the scope of this domestic surveillance? They're aiding and abetting the enemy of the United States. You mean their phones can be tapped?

Now, I would say to the Court that the question asked by this Court in Baggett v. Bullitt: Where does fanciful possibility end and and intended coverage begin? goes to the heart of this issue.

Goes to the heartof this issue. Unless this program, now loudly proclaimed by the Executive, of uncontrolled executive, warrantless, open-ended wiretapping of domestic political opponents, unless this is decisively repudiated, not sidestepped, and I urge deeply decisively repudiated by this Court, the inevitable effect will be, not to -- and here I pause for a moment, I will not use the word, which I heard the Solicitor General two days ago before this Court say, was overworked in this Court; I will not say that the inevitable effect will be to "chill" the exercise of democratic rights. I would say the inevitable effect would be to choke and stifle the exercise of First Amendment rights by millions of American

citizens; millions of American citizens.

And I call to the Court's attention the poignant and incisive discussion of Judge Kiley of the Court of Appeals for the Seventh Circuit, in his fascinating article, "Privacy's Last Stand", in which he warned us all, speaking of this pattern and danger of surveillance, that"it seems enough to contemplate the spectre of a Big Brother observing how we think, we feel and act, and the oppressive moral and political climate that would tend to suffocate our freedom."

And to me the most disturbing aspect of this case is the frank willingness of the Executive to engage in such a program. And in its eagerness to sustain such a program, the Executive attempts to evade the prohibitions of the Fourth Amendment, the question Justice Marshall asked from the bench of Mr. Mardian, by saying, as Mr. Mardian said here this morning, that this program of domestic political espionage is unrelated to any criminal investigative activity, but is merely an intelligence-gathering operation.

But what Mr. Mardian does not discuss is that attempt to evade the protections of the Fourth Amendment was repudiated by this Court directly, squarely, and head-on in Camara. When the opinion of the Court, Justice White's opinion of the Court, met head-on the argument there made by the State authorities, that we're not involved in this Fourth Amendment problem because our intention is not to look for criminal violations,

we're looking for other events going to the health and safety of the community.

And this Court said that that misses the whole point. And what did it do, in a fascinating way? The majority opinion, the opinion of the Court in Camara, adopted approvingly the dissenting opinion of Justice Brennan in Abel, Abel v. United States, in which the Justice pointed out, and reflected in the Camara opinion, that this misses the whole point of the Fourth Amendment, that the right protected by the Fourth Amendment is not the right to be secure from having evidence of criminal activity taken from you unreasonably. That's not the right protected.

The right protected is, to use again the words of this Court again and again, the sacred inalienable right that's used in Boyd, the words in Boyd, the words of Justice Brandeis in Olmstead, the absolute right to privacy. That the issue is not why that right is being violated, the Fourth Amendment stands to protect the citizens of this country from arbitrary invasion of their rights.

It stuns me a little bit to hear the argument made by a representative of today's Executive, which were made by the representative of George III in Entick v. Carrington, the precise argument. This Court is told, as was the British Court in Entick, that courts cannot look at the reasons for the search. That resides in the special knowledge of the Crown.

The British Court was told in Entick: You must sanction this general search for -- and these were the words from Entick -- for reasons of State, for reasons of necessity; though we can't tell you all the facts of those, because they reside in the head of our Chief Executive officer, known as the Secretary of State.

Those were precisely the arguments raised in England. Those were the arguments the Fourth Amendment was designed to eliminate.

Mr. Mardian's argument is not with us. Mr. Mardian's argument is with those who wrote the Fourth Amendment. Mr. Mardian's argument, and the government's brief, reads as if, saying that, Oh, it's perfectly all right, we can do all these things because we're conducting investigative intelligence gathering,as if the Executive has limitless, uncontrolled powers in the area of political association, beliefs, and activities.

All of which, as this Court taught in Stanford, all of which are affected by the general searches conducted here, as if the general searches because, the government says, the general Executive -- I think it's important for us to be precise in our language here. I prefer not to use the term "the government" here. The issue is too profound and too serious.

The Executive says that if these general searches are conducted unrelated to the purposes of immediate criminal

prosecution, then we can do whatever we like in the vast area of political association, beliefs, and activities; we can have whatever wiretapping we want to have there, and it doesn't matter what effect it has on people's willingness to engage in political activity, on people's willingness to engage in political association.

I suggest that this Court has taught, and only recently has reaffirmed, the profound words which this Court now has written into fundamental law of Justice Brandeis concurring in Whitney v. California, and only recently in Brandenburg, did this Court write those words into the fabric of our law that government action which impinges on the delicate and vulnerable freedoms, the words of Butnam, is tolerated if at all only when required to prevent the most imminent, immediate, serious, goalless action of a clear and present danger of a substantive evil of a serious nature within the power of the government.

But the argument of the Executive here is the total rejection of Justice Brandeis's philosophy, and the philosophy, I suggest, of this Court, and the philosophy of the Constitution of the United States, which Mr. Mardian has told us the President is sworn to uphold.

Because the Executive now demands the power for general searches in the area of domestic political activity, in the absence of any showing of probable cause for criminal

prosecution on the unchecked say-so of one man, and we were told this morning that the absolute sacred privacy rights of American citizens are best protected in the hands of one man. No, those who wrote the Fourth Amendment did not agree with that.

And as this Court said in Coolidge just last term, those fundamental values are sometimes questioned these days. This Court said, sometimes people feel that these values still work. And the Court pointed out that, used the words, fear of internal subversion sometimes makes us shake about these values. But that's what this Court sits here for, is to protect those fundamental values; those judgments were made when the Fourth Amendment was written.

Now, I suggest to the Court that no program of government activity which touches the area of the First Amendment and First Amendment rights has ever come before this Court for review which so totally ignores the most elementary teachings of the Court.

Examination of the Attorney General's affidavit is perhaps the most imprecise, overly broad, vague, dragnet-type standard words every brought before the Court. Compare it to the words sanctioning governmental action, struck down in Baggett-Bullitt, struck down in Cramp, struck down in Keyishian. This Court says that when Fourth Amendment problems touches the First Amendment, in Stanford, precision and strict formula-

tion are required.

This case reflects precision, strict formulation.

Now, I can understand why the government is so desperately trying in this Court to bury the Attorney General's affidavit as the basis for their action. I find it slightly surprising, from a litigation point of view, from an elementary fairness point of view, that the first time the Executive takes the position that the Attorney General's affidavit is not what you look to to find the basis for the search, the first time they took that position is in the reply brief we got five days before this oral argument.

You look back to their main brief, go back to the original brief filed in the District Court, that Judge Keith acted on, go back to the brief filed in the Court of Appeals to the Sixth Circuit, and then what's so interesting: recently we argued in the Seventh Circuit the identical issue with other representatives of the Executive, in United States v. Dellinger, and in the Seventh Circuit the representatives of the Department of Justice got up and said, when questioned from the bench as to what's the basis for the searches, they said: Well, look at the Attorney General's affidavit, Your Honor.

No, in this Court now they're running from that affidavit. It's perfectly clear why they're running from the affidavit. Because the affidavit, on its face, reveals the

fundamental violation of the First and Fourth Amendments.

But in one sense there is something deeply serious that is reflected by their running from the affidavit. Now, this five days prior to argument, the citizens are not even allowed to know the basis for the declaration of fundamental rights.

What are we told? No, you can't look at the Attorney General's affidavit any longer; that's not the reason for the rights.

And what kind of limited judicial review can there be if the citizen doesn't even know -- forget about the facts underlying the action -- doesn't even know what the basis for it is, the claim of right to set aside Fourth Amendment rights. What are we told?

That basis is in secret documents which, in a magic way, seem to enlarge, as this case goes on, the documents before Judge Keith. And then, all of a sudden, there are supplemental envelopes before the Court of Appeals; then, all of a sudden, there are new envelopes filed before this Court; and now they're not so secret, these envelopes, what's in them, because whenever it suits the Executive's convenience, they tell us and the courts openly, publicly, what are in them; but for the first time today -- it's astounding to me -- for the first time today we were told in this litigation that in these envelopes there is a memorandum from the head of the

Federal Bureau of Investigation discussing prior wiretaps and prior surveillances.

We never heard that before. Well, if that was so secret, that it can now be discussed openly before this Court, why weren't we told a long time ago?

But what emerges, that if the basis for the deprivation of fundamental rights are in these secret documents, which we don't know and we can't see, which we can't even challenge, I suggest that we have arrived now in 1972, we've already arrived in 1984: nothing could be more grotesque than the situation in which we don't even know what the basis for the deprivation of fundamental rights is. And what does this do? It makes a mockery of any pretense of judicial review; supposedly a safeguard.

Now, I would suggest that if sanctioned by this Court, this warrantless general wiretapping of domestic -- and I stress that; there is no question here of the so-called foreign intelligence exception discussed in Katz, discussed in Giordano. This was not supposed to be a test case from the government's point of view, from the Executive point of view, of the so-called foreign exception.

They loudly, from one end of the country to the other, the Attorney General gave speeches in which he talked about this case, in which he said they are testing the domestic -- their right to have domestic surveillance of so-called domestic

subversion.

All of a sudden they discovered they are on very shaky constitutional grounds. So, at the last moment, they try to infect this case with an inference of foreign affairs.

Well, I suggest to this Court that it is not so difficult to disentangle one from the other; that this, throughout the history of this country, has been the source of the most serious eroding, the most serious eroding of constitutional liberties. At every turning point in the history of the nation, where there's been a challenge to fundamental constitutional liberties, it has always been in the name of foreign agents.

When the first attack on Jefferson and the Jeffersonians emerged, what was it? They were French agents, and therefore Alien and Sedition Act was all right, brush aside the First Amendment, pull them in and try them for sedition. Why? Because they were French agents, foreign agents.

This Court is well aware of the same development around the Palmer Raids, and a member of this Court was the author of that famous document, Practices of the Department of Justice, Justice Frankfurter, pointing out that once again, at the end of World War I, the fear of foreign agents was the thing that intermingled into a cover to destroy -- what? -- constitutional protections for American citizens. For American citizens.

And this Court has lived through and proudly emerged

from the period of time we all know as the period of the McCarthy hearings, the period in which, once again, the fear, the fears, the cold fear of foreign, foreign elements was used. Why? To undermine the Fifth Amendment.

The present Solicitor General of the United States wrote an important document on the erosion of the Fifth Amendment during that period of time.

I suggest we face that problem once again, and this Court, as it did at each turning point in our history, must stand resolute now to reject this effort to introduce this spectre, this fear which erodes the fundamental rights of all Americans, not just the three young men before this Court.

I think the seriousness of what the Executive is asking for is reflected in the constitutional theory which it now emerges full-blown, the theory that in the domestic area there is an inherent power to do whatever the Executive feels is necessary to be done.

I will not take time with this, because this Court has over and over again rejected that concept. Only this last June, in New York Times, in the powerful opinion of the late Justice Black, that doctrine which this Court, at the end of the Civil War, called the most pernicious doctrine in ex parte Milligan, the most pernicious doctrine that the Executive, through its inherent powers, can -- what? -- suspend constitutional guarantees. That's what they're asking for here.

The power to suspend constitutional guarantees. Because they say.

No. This is not the system of government which was created in this country. The system of government which was created in this country is a system of limited powers. Yes, it may not work as well, as Justice Frankfurter pointed out in Youngstown, may not work as well as some other government. To be more efficient, you press a button in another government, you don't have to worry about warrants; you don't have to worry about courts; do what you want to do.

But that's why this country was set up in the way it was. And that's why this Court sits, precisely to protect this country and the citizens of this country from the erosion of the fundamental constitutional values, which make us strong and safe.

I have exhausted my time and would like to say one word, if I may, one word on the last question which the Executive raised here with respect to the Alderman case, the Alderman opinion.

I was rather surprised to hear the representative of the Executive say that what they're asking for in their brief is consistent with Alderman. I will not argue that. It's right in their brief. They ask this Court to reconsider Alderman. They ask this Court to overrule Alderman. They ask this Court to throw out its decision of three years ago, well

thought out, well reasoned, and the thing that settles the inappropriateness of that request at this moment is the question the Chief Justice asked earlier, and that is: that the Court of Appeals itself, in looking at these logs, and the Court will be aware of that at the end of the opinion, said: It is impossible for us to say, in looking at these very conversations, that there might not have been prosecutorial bases; and therefore there has to be an adversary hearing.

So that I suggest that this Court should affirm the decision of the Sixth Circuit, and in affirming the decision of the Sixth Circuit, this Court will be affirming the Fourth and the First Amendments to the Constitution of the United States.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kinoy.

Mr. Mardian.

If you need it, we'll enlarge your time by a few minutes.

MR. MARDIAN: Pardon me?

MR. CHIEF JUSTICE BURGER: If you need it, we'll enlarge your time about two minutes; perhaps you won't need it.

MR. MARDIAN: I don't think I'll need it.

MR. CHIEF JUSTICE BURGER: You have 18 minutes.

REBUTTAL ARGUMENT OF ROBERT C. MARDIAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MARDIAN: I should first like to allude to the statement by Mr. Justice Stewart, with reference to a constitutional definition of a warrant. I am unaware of any constitutional definition of a warrant, as such. I think the Constitution speaks of a warrant.

This government has recognized numerous types of warrants. I think in footnote 13 of our brief, in our reply brief, we indicate, and this was not intended to be a comprehensive search, 20 instances where the Congress of the United States has provided for either warrantless searches or searches conducted under warrants issued by persons other than members of the Federal Judiciary.

Counsel have cited the case of Abel vs. United States. In fact, we urged the Abel case in the Sixth Circuit Court. And it's interesting to note that the Sixth Circuit Court, when referring to Abel, stated that Mr. Abel was arrested by a warrant which, in the opinion of the Court, was found to have been lawfully issued by a lawfully authorized magistrate, and that the materials seized at the time of his arrest were held legally admissible as incident to that arrest.

That decision in that case was written by Justice Frankfurter. The warrant was not issued by a magistrate, the warrant was issued by an officer in the Department of Immigra-

tion and Naturalization Service, a subordinate of the Attorney General of the United States.

I would suggest, in this regard, that while the warrant requirement, as it pertains to judicial proceedings, criminal judicial proceedings especially, by and large are issued by members of the Federal Judiciary. There is a great body of statute in this country which permits not only warrantless searches, which we have alluded to in some of our briefs, but warrants issued by persons other than Judicial magistrates.

Q Mr. Mardian, you, I thought, referred to footnote 13 of your reply brief; and I can't find it.

MR. MARDIAN: Pardon me, it's in the main brief, Your Honor.

Q And it's not in footnote 13 of your main brief, that I see. Perhaps I've missed something.

I don't want to delay you --

MR. MARDIAN: I may have the footnote wrong, sir, and I'm sorry --

Q -- or hold you up. I just can't find it.

MR. MARDIAN: -- if I have. But I could recite the 20 instances --

Q No, don't do that.

MR. MARDIAN: -- we have, but --

Q I would be interested in where it is in this

brief -- afterwards, if you will.

MR. MARDIAN: Yes, sir; I will. I'm sorry.

Q That's perfectly all right.

Q Mr. mardian, in all of these instances of other people issuing warrants, aren't they all subject to judicial testing?

MR. MARDIAN: I -- on a writ of habeas corpus, which I believe was the --

Q I didn't say on any writ. They're subject to judicial testing?

MR. MARDIAN: Yes. They are subject to --

Q In your position, judicial test means an adversary proceeding with two parties; is that correct?

MR. MARDIAN: The judicial review, I would say, based upon the warrant requirement in each case.

Q And isn't that an adversary proceeding?

MR. MARDIAN: Yes, sir.

Q But here we don't have an adversary proceeding?

MR. MARDIAN: Well, in this regard, I was interested in the statement by Mr. Gossett, in which he says that he's in the dark as to the contents of the in camera exhibit.

Mr. Gossett represents the respondent court, and the respondent court certainly had in its possession, and that in camera exhibit should have been available, if it wasn't, to the attorney for the respondent court as distinguished from the

respondent defendants.

Q I understood that "in camera" means for the eyes of the judge and nobody else. Am I right or wrong?

MR. MARDIAN: We have, in the past, and I think before this Court not too recently, submitted to this Court in camera, and to the attorneys for the parties. In that case it was not a Federal District Judge, but the defendants in the case itself.

Q Well, did you at any time, after this case started, did you tell Judge Keith that he was -- could show it to him or not?

MR. MARDIAN: No, we never told him he couldn't.

Q Well, where could he infer that he had the right to? You told this: This is for your inspection only.

MR. MARDIAN: I would assume --

Q Isn't that what was said?

MR. MARDIAN: I would assume that at the time this matter came before the Circuit Court, at least, and before this Court, when Mr. Gossett became counsel of record, had there been any --

Q Well, let me ask you now: Can Mr. Gossett see it now?

MR. MARDIAN: Yes, sir.

Q He can see it now?

MR.MARDIAN: Yes, he may see it. Yes, Mr. Justice,

he may see it now.

Q Well, why are they here under seal?

MR. MARDIAN: The contents, I presume, are known to -- or should be known to Judge Keith, and we have no objection to Mr. Gossett's viewing the in camera exhibit.

Q Mr. Ki- -- both of the lawyers?

MR. MARDIAN: Mr. Gossett, who represents the respondent court, we certainly --

Q But the other lawyer can't see it? The lawyer representing the people involved can't see it?

MR. MARDIAN: Well, there's only one person involved, contrary to counsel's statement. The only overhearing that we have is the overhearing of the defendant Plamondon. The other two are here before this Court only because --

Q The one whose name is Plamondon --

MR.MARDIAN: Plamondon, yes, sir.

Q -- can his lawyer see it?

MR. MARDIAN: No, the government's position which initiated --

Q Well, we wouldn't have an adversary proceeding, would we?

MR. MARDIAN: Well, we would not have an adversary proceeding in any instance where the overhearing involved matters relating to the national security. If there is a distinction between overhearings in so-called foreign intelli-

gence cases, as distinguished from national security cases, I have been unable, as objectively as I can, to distinguish between so-called domestic and foreign intelligence.

Now, counsel brought up the fact that in one of our footnotes we referred to documents which we submitted to the Ninth Circuit Court of Appeals on a motion to augment the record. That case came up, was tried before the Keith case, that's the Ferguson -- or Smith case. In Judge Keith's opinion, he refers in extenso to the opinion of Judge Ferguson.

And the way the matter arose was this: In the Smith case, which is still pending before this Court, I understand, we made an in camera submission to the court, and I believe that in camera submission consisted of one sheet of paper, which again was an incidental overhearing of the defendant Smith.

We urged in that case that it was a national security intelligence tap, and I think the record will disclose that it's the same tap that is before this Court.

In that case we urged that the information contained in the log should not be disclosed, and its disclosure would not be in the interest and would be prejudicial to the national security.

We did not argue in that case, nor was the question raised by the court or by the defendant, that that case involved a domestic intelligence case. Yet, in the determination

of the Court in the Ninth Circuit case, Judge Ferguson, he held that the government was required to disclose, again as a prelude to a taint hearing, the overhearing on the grounds that, and he used the term 13 separate times, purely domestic or wholly domestic organization, or purely domestic or wholly domestic intelligence. And yet the only basis for that fact determination was the in camera submission of one sheet of paper which indicated the overhearing of the defendant Smith's voice.

For that reason, when the matter went before the Ninth Circuit, the government sought to augment the record and to let the court view all of the overhearing of the surveillance in question, to determine whether it was in fact wholly domestic or purely domestic, or whether it was a wholly domestic or purely domestic organization. An examination of the logs will disclose that it's not a wholly domestic or purely domestic, its foreign ties exceeded its domestic ties.

And it was for that reason that we made that offer to the court in the Ninth Circuit. And we would make that offer to this Court, if the Court would like to view the record which we submitted in that case.

Now, with reference to why we footnoted the reference to the Smith case, that footnote, that brief was drawn at the time that Judge Ferguson sought a petition in this Court for certiorari, before the determination in the Ninth Circuit. And

we acquiesced in that petition and sought to have this Court hear both cases together, so that this Court could view the in camera submission which was made at the Circuit Court level stage.

I take, and I must take, some exception to the characterization of this case as an attempt on the part of the government to engage in electronic surveillance for the purpose of observing the activities of dissident political groups.

The statute under which this government is operating certainly prohibits that.

I would also point out that this whole question of electronic surveillance and what is disclosed, this Court must, as a coordinate branch of government, rely almost entirely on the integrity of the Executive Branch. It was the Executive Branch, through the then Solicitor General, who now sits on this Court, who made the disclosure to this Court, and in each instance where a motion is made under Rule 16 it is the integrity of the government that has to be relied upon, unless this Court is going to fashion a rule which wdoul permit every defendant to rummage all of the files of all of the investigative agencies of government.

Now, administratively, we suggest this can't work. Administratively, it would break down the separation of powers that exist between government, and would also break down the entire law enforcement function of government.

Where do we go less than that? When the motion is made, the government responds. If the government is not to be trusted to respond with respect to a motion under Rule 16, then it should be expected, I assume from what counsel has said, to respond honestly with respect to the nature of its activities.

Now, certainly, neither this President nor any prior President, to my knowledge, has authorized electronic surveillance to monitor the activities of an opposite political group.

The only purpose is, as I have stated: one, to obtain the on-going intelligence necessary to compete in the area of foreign affairs, and the on-going intelligence necessary for this nation to protect itself against not only its foreign foes but its domestic foes.

Now, counsel Gossett has suggested that we might, in this area, use the provisions relating to cases involving sabotage or espionage. I would submit that if it were a sabotage case, or an espionage case, we certainly should invoke the provisions of the statute.

But when we're talking about the on-going intelligence function of government, there is no probable cause in many cases, as that term is used in the criminal prosecutive sense.

Now, I don't know that it's an appropriate analogy, but certainly the protection of the President of the United

States against assassination is one aspect of the nation's national security. Heads of State have been assassinated to bring down governments. A simple cursory examination of the Warren Commission Report will find, will disclose numerous instances where the Federal Bureau of Investigation and the Secret Service were criticized for not having the on-going intelligence necessary to provide adequate protection to the President.

I suggest again, with respect to the provisions of Article IV, Section 4, of the Constitution, which the Congress has -- execution of which the Congress has placed in the President, there is no distinction in the constitutional Article or in the statutes passed pursuant thereto with respect to the Presidential authority as it relates to invasion or civil insurrection.

Both require on-going intelligence. Because without that intelligence, the President cannot make an appropriate decision.

As the Court held in the Kennedy case, the Constitution isn't a suicide pact. The President can't wait until the moment of invasion or insurrection to start putting together a counter-intelligence function. The President must have this information if he's to carry out his responsibilities under the Constitution, to defend this nation against invasion or domestic violence.

And we submit that the record of the past six Presidents, and the past twelve Attorneys General, is deserving of the high esteem of this Court, is deserving of permitting the Chief Executive to carry out his function under the Constitution and within the constraints of the Fourth Amendment, as I have attempted to define them here.

Thank you, Mr. Chief Justice.

Q Mr. Mardian, on this question about Mr. Gossett seeing this. Reading from page 21 of the record:

"Accordingly, the sealed exhibit referred to herein is being submitted solely for the court's in camera inspection."

Does that change your mind?

MR. MARDIAN: No, sir.

Q Well, that's the Attorney General's affidavit. That's what the Attorney General said: I'm giving it to you, Judge Keith, solely for your in camera inspection.

MR. MARDIAN: This was before the petition for writ of mandamus was filed, and before Judge Keith was represented by Mr. Gossett.

As we have in all cases, to my knowledge, and as we did before this Court in the Times and Post case, we permitted examination, not by a member, -- not in a case where a judge was involved -- but by not one but several, four members of --

Q Well, do you think that a judge reading that would be free to turn it over to anybody else?

MR. MARDIAN: I think, if there is a misunderstanding in this case it was not on the part of the government; had a request been made, most assuredly --

Q I understood you to say you were sure Mr. Gossett had seen it.

MR. MARDIAN: I had assumed that he had seen it. I had assumed that.

Q Do you still make that statement after this?

MR. MARDIAN: No, sir. If Mr. Gossett says he hasn't seen it, he hasn't seen it. But had Mr. Gossett requested the opportunity to see the in camera exhibit, Mr. Gossett's reputation is such that there would be no question that the government would have acquiesced in that manner.

Q Mr. Mardian, reference had been made the other day to wholesale use of this type of surveillance, indicating that it has been sharply on the increase. What are the actual facts with respect to whether or not it is currently and in recent years has been used more frequently than five years or ten years ago?

MR. MARDIAN: I recently responded to a letter from Senator Kennedy from Massachusetts, and I set forth the actual figures that the Department of Justice had with respect to electronic surveillances. The Director of the FBI, Mr. Hoover, testifies annually during his budget hearings, and will be testifying within the next week or two as to the extent of

electronic surveillance.

I can say without qualification that rather than its being increased, that there has been a substantial decrease in the amount of electronic surveillance in the area in which we're speaking.

That is a matter within the knowledge of the Executive Branch of the government, and, when requested, we have disclosed on some occasions the --

Q I've been trying to get the figures. I read in the paper attached to here, in this case, a letter from Senator Kennedy to somebody, some other Senator, and I haven't been able, yet, to get the figures that he quoted. Would you be able to supply them?

MR. MARDIAN: Yes, Mr. Justice.

Q The problem is not one of secrecy, the problem is one that the Judiciary Committee hearings are not -- they'll probably print it and distribute it.

MR. MARDIAN: We considered this matter, as did the Committee of the Privy Council of England, as to how often you should distribute the figures. Certainly if the figures are disclosed on an on-going basis, information relative to the intelligence function of government can be gleaned; but we did, on that occasion, in response to Senator Kennedy, give him the figures that indicated the total number of surveillances for the entire year, the maximum number at each

time.

You get into this numbers game, Mr. Justice, and you have problems, because we, in our brief in the Sixth Circuit and in the Ninth Circuit as well, indicated the figures, the testimony of the Director of the FBI before Congress over the past ten years, and those figures were as of the day he testified. The figures I gave Senator Kennedy were the actual figures which we have in the Department of Justice, and included not one day -- a particular day, which happened to coincide with Director Hoover's testimony; but the maximum number on any day, and the total number for the entire year; both as to telephones and microphones.

Q Some of this information is set forth in footnote 10 at page 27, as I recall, of your brief?

MR. MARDIAN: Yes, sir. Now, those are the figures testified to by the Director, and the only purpose was to show the decrease. We were not intending to indicate anything other than the fact that they had decreased over the years.

I believe in one of -- I believe there has been reference, as Justice Douglas said, to a letter from Senator Kennedy. The letter was to me, I believe, not a Senator; and I responded.

Q No, this was a letter to another Senator, I forget who that Senator was. But I can probably get these on my own if you're not willing to --

MR. MARDIAN: No, I said I would supply them.

Q Thank you.

MR. CHIEF JUSTICE BURGER: I understand that you will supply a copy of that letter, which will probably do it?

MR. MARDIAN: Yes, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

MR. MARDIAN: Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Mardian.

Thank you, Mr. Gossett.

Thank you, Mr. Kinoy.

The case is submitted.

[Whereupon, at 2:51 o'clock, p.m., the case was submitted.]

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