The Burger Court Opinion Writing Database

United States v. United States District Court for Eastern District of Michigan

407 U.S. 297 (1972)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 6, 1972

Re: No. 70-153 - U. S. v. U. S. Dist. Ct., East District, Michigan, Southern Division

Dear Bill:

I have your memo of March 6 and see no reason why Lewis should not undertake to write and see what support his position achieves. I am not as clear on Lewis' position as your memo suggests but I would be happy if his view could command a majority.

I believe there may be much likelihood of Byron's securing substantial support and I am not sure Byron's and Lewis' views are not rather close.

In all events this, like several other of our current cases, will not clarify until we have something in writing.

I adhere to my request that Byron proceed to write. We cannot evaluate the views until we see them. They may not "write" as they were expressed at Conference and of necessity few were very precise -- or could be.

Regards,

WEB

Mr. Justice Douglas

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 26, 1972

PERSONAL

No. 70-153 -- United States v. United States
District Court, E.D. Michigan

Dear Lewis:

I have reviewed the May 22 draft in the above and for my part I still find too much of the language I cannot join.

Will you therefore show me as joining only in the result.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

March 6, 1972

Dear Chief:

In No. 70-153, U. S. v. U. S. D. C., I would like to make a suggestion.

I think the assignment to Byron (much as I love my friend) is not an appropriate one for the reason that he and two others including yourself voted to affirm on the statute, while there were five who voted to affirm on the Constitution. Those five were Brennan, Stewart, Marshall, myself, and Powell.

You will recall that Lewis Powell said that to handle the government's problem of searching the country over for an appropriate magistrate to issue a warrant, an opinion should be written suggesting that the court here in the District of Columbia should handle all of the cases, which I thought was a splendid idea.

With all respect, I think Powell represents the consensus. I have not canvassed everybody, but I am sure that Byron, who goes on the statute, will not get a court.

To save time, may I suggest you have a huddle and see to it that Powell gets the opinion to write?

Or if you want me to suggest an assignment, that would be mine.

W. O. D.

The Chief Justice

March eighth
1972

Dear Lewis:

Re: No. 70-153 - U. S. v.
U. S. Dist. Ct.

As you know, the Chief and I have had an exchange of correspondence on the above case.

The vote at Conference was to affirm but there were five of us who could not do it on the statute but went on the Constitution. And according to my notes, you were one of the five. Byron, however, was explicit. He could not go on the Constitution but would have to go on the statute.

Traditionally an opinion would therefore be in the province of the senior Justice to assign. That was not done in this case and the matter is of no consequence to me as a matter of pride and privilege -- but I think it makes a tremendous difference in the result.

I am writing you this note hoping you will put on paper the ideas you expressed in Conference and I am sure you will get a majority. I gather from the Chief's memo that he is not at all averse to that being done.

William O. Douglas

Mr. Justice Powell

Copy to Mr. Justice Brennan

Dear Byron
For your information
WOD

WM Doug
0-71
70-153

May 4, 1972

Dear Lewis:

Re: No. 70-153 - U. S. v. U. S. D. C.

As you know, Bill Brennan is considerably disturbed by footnote 20 in your opinion.

You state in the text: "We have not addressed, and express no opinion with respect to, the issues which may be involved with respect to activities of foreign powers or their agents."

I thought as I read that that it was a very proper reservation, and I still think it is.

Bill Brennan apparently thinks that footnote 20 squints toward a position that is in support of the American Bar position. It is a question which, as you know, is highly controversial, and Bill Brennan and I expressed our views on it in the Katz case.

The Court has never spoken on it, and this certainly is not the time to do so.

But I was hoping that you could find some way to satisfy Bill Brennan so as to bring him into the opinion. It would be fine if this could be wholly unanimous.

W. O. D.

Mr. Justice Powell

Wm Doug
Oct 71

70-153

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May [illegible]rth
1[illegible]

Dear Lewis:

I am happy to join your fine opinion in No. 70-153 - United States v. U. S. District Court.

I may possibly file a separate opinion, not in derogation of what you have written, but in further support of it.

William O. Douglas

Mr. Justice Powell

CC: The Conference

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70–153

United States, Petitioner, *v.* United States District Court for the Eastern District of Michigan, Southern Division, et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. Yet, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy duty to show that "the exigencies of the situation [make its] course imperative." [1] Other abuses such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers,[2] the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and "bugging" of which their victims are totally unaware. Moreover, even the possibility of after-the-fact judicial review at criminal trials and the

[1] *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455; *McDonald* v. *United States*, 335 U. S. 451, 456; *Chimel* v. *California*, 395 U. S. 756; *United States* v. *Jeffers*, 342 U. S. 48, 51.

[2] See *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U. S. 388.

B
1-26
1

To : The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

4th DRAFT

Mr. Justice Douglas; J.

SUPREME COURT OF THE UNITED STATES

Circulate: _____

Recirculated: 5/25/72

No. 70–153

United States, Petitioner, *v.* United States District Court for the Eastern District of Michigan, Southern Division, et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, concurring.

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[1] *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455; *McDonald* v. *United States*, 335 U. S. 451, 456; *Chimel* v. *California*, 395 U. S. 756; *United States* v. *Jeffers*, 342 U. S. 48, 51.

[2] See *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U. S. 388.

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 70-153

United States, Petitioner, *v.* United States District Court for the Eastern District of Michigan, Southern Division, et al.	On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1972]

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. Yet, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy burden to show that "exigencies of the situation [make its] course imperative."[1] Other abuses such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers,[2] the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and "bugging" of which their victims are totally unaware. Moreover, even the risk of exclusion of tainted evidence would here appear to be

[1] *Coolidge* v. *New Hampshire*, 403 U. S. 443, 455; *McDonald* v. *United States*, 335 U. S. 451, 456; *Chimel* v. *California*, 395 U. S. 756; *United States* v. *Jeffers*, 342 U. S. 48, 51.

[2] See *Bivens* v. *Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U. S. 388.

June 15, 1972

Dear Lewis:

Would you please announce my concurrence in the No. 70-153 - U. S. v. District Court, etc. case?

W. O. D.

Mr. Justice Powell

Wm Douglas
Oct 71
70-53

May 18, 1972

RE: No. 70-153 - United States v. United States District Court for the Eastern District of Michigan, etc.

Dear Lewis:

The changes you have made meet completely my concerns. I very much appreciate your bearing with me.

I therefore make bold to offer one more suggestion. This concerns the last full paragraph on page 13 through the quote from Chief Justice Hughes in Cox v. New Hampshire. Am I correct in believing that those paragraphs are a summary of the Government's justification for the asserted authority? If I am, could something like the additions I've noted in the margins at pages 13 and 14 be made to make that clear? My recollection is that Ramsey Clark's attitude was in part explained by his disagreement with these propositions and I make the suggestions to avoid any misunderstanding that the Court is resolving the controversy.

Sincerely,

WJB

Mr. Justice Powell

Wm. Brennan Oct 71 - Board on CJPS letter [illegible] 5/19/72

May 19, 1972

RE: No. 70-153 - United States v. U.S. District Court of the Eastern District of Michigan, etc.

Dear Lewis:

Thank you very much for your consideration of my suggestions in the above. Your proposed accommodation is entirely satisfactory. Thank you again for bearing with me.

Sincerely,

WJB

Mr. Justice Powell

Wm. Brennan
OCT 71

— Based on LP's letter to WJB of 5/19/72 this appears to be from Brennan

B

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 4, 1972

70-153, U. S. v. U. S. District Court

Dear Lewis,

I think you have done a fine job in this case, and I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

1st DRAFT

Circulated: 3-15-72

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70-153

United States, Petitioner, *v.* United States District Court for the Eastern District of Michigan, Southern Division, et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[March —, 1972]

Memorandum of MR. JUSTICE WHITE.

This case arises out of a two-count indictment charging conspiracy to injure and injury to Government property. Count I charged Robert Plamondon and two codefendants with conspiring with a fourth person to injure Government property with dynamite. Count II charged Plamondon alone with dynamiting and injuring Government property in Ann Arbor, Michigan. The defendants moved to compel the United States to disclose, among other things, any logs and records of electronic surveillance directed at them, at unindicted coconspirators, or at any premises of the defendants or coconspirators. They also moved for a hearing to determine whether any electronic surveillance disclosed had tainted the evidence on which the grand jury indictment was based and which the Government intended to use at trial. They asked for dismissal of the indictment if such taint were determined to exist. Opposing the motion, the United States submitted an affidavit of the Attorney General of the United States disclosing that "the defendant Plamondon had participated in conversations which were overheard by Government agents who were monitoring

pp 1, 3-5

p. joined 8/4

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

2nd DRAFT

Circulated: _____

Recirculated: 5-5-72

SUPREME COURT OF THE UNITED STATES

No. 70-153

United States, Petitioner, *v.* United States District Court for the Eastern District of Michigan, Southern Division, et al. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1972]

MR. JUSTICE WHITE, concurring in the judgment.

This case arises out of a two-count indictment charging conspiracy to injure and injury to Government property. Count I charged Robert Plamondon and two codefendants with conspiring with a fourth person to injure Government property with dynamite. Count II charged Plamondon alone with dynamiting and injuring Government property in Ann Arbor, Michigan. The defendants moved to compel the United States to disclose, among other things, any logs and records of electronic surveillance directed at them, at unindicted coconspirators, or at any premises of the defendants or coconspirators. They also moved for a hearing to determine whether any electronic surveillance disclosed had tainted the evidence on which the grand jury indictment was based and which the Government intended to use at trial. They asked for dismissal of the indictment if such taint were determined to exist. Opposing the motion, the United States submitted an affidavit of the Attorney General of the United States disclosing that "the defendant Plamondon had participated in conversations which were overheard by Government agents who were monitoring

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 4, 1972

Re: No. 70-153 - U. S. v.U. S. District Court,
Eastern District of Michigan

Dear Lewis:

Please join me.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1972

Re: No. 70-153 - U.S. v. U.S. District Court for the Eastern District of Michigan

Dear Lewis:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
LEWIS F. POWELL, JR.

March 9, 1972

Re: No. 70-153 U. S. v. U. S. District Court

Dear Chief and Bill:

In view of the exchange of notes as to how we proceed with the opinion writing in the above case, I thought it might be well for me to outline my present thinking on this case. I have no very clear idea as to whether the substance of these views is shared by other members of the Court. I suspect each of us differs in certain respects.

Byron (to whom I am sending a copy of the memorandum) is clearly better qualified than I am to write, and I assume that he will do so. But I will undertake to enlarge this memorandum into a draft if this seems desirable.

Sincerely,

Lewis

The Chief Justice
Mr. Justice Douglas ✓

lfp/ss

cc: Mr. Justice White

Wm Douglas
Oct '71
70-153

March 9, 1972

No. 70-153 U. S. v. U. S. District Court

Memorandum to:

The Chief Justice and Mr. Justice Douglas

This refers to your notes as to the drafting of opinions in the above case.

As views were fractionated (and in some instances, tentative) at the Conference, I am not at all sure that any opinion will command a majority. My own views, subject - as always - to more careful study and mature consideration, may be outlined briefly as follows:

I.

There are three types of situations in which the government is employing electronic surveillance:

1. Specified types of crime. Title III of the Omnibus Crime Act authorizes the use of surveillance in cases involving specified crimes or types of crimes. This authority is subject to prior court order, and to complying with the rather detailed and specific standards specified in the Act. The Act was drawn to meet the requirements of Katz.

2. National security. Section 2511(3) of Title III contains a disclaimer that:

> "Nothing contained in this chapter . . . 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."

This recognizes the special responsibility of the President for national security. It is in conformity with the uniform practice of Presidents since President Roosevelt's memorandum on this subject in World War II. The inclusion of this section in Title III recognizes, implicitly if not explicitly, that the system of judicial supervision and public disclosure required by Title III with respect to specified crimes is not appropriate in national securities cases.

3. Domestic subversion. Section 2511(3) also provides (immediately following the language quoted above):

> "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 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."*

*The final sentence in § 2511(3) provides that any communication intercepted by authority of the President in the exercise of these powers "may be received in evidence" only where such interception was "reasonable".

This language, to the same extent perhaps as that quoted in 2 above, indicates a Congressional intent to exclude such Presidential action from the judicial supervision and other standards prescribed in Title III. It also suggests a Congressional judgment that the President's extraordinary power in this respect is not limited exclusively to national security involving foreign powers. But the extent of this power is not clear from the language quoted. It does contemplate, however, situations where foreign powers are not involved and where the threat of "overthrow" or "other clear and present danger" emanates from American citizens or domestic organizations.

II.

I come now to the case before us. There was no testimony. The case was submitted on the basis of the Attorney General's affidavit and the logs of the surveillance which were presented for in camera inspection only.* The Attorney General's affidavit reads in pertinent part as follows:

*I have not yet examined the logs, but my recollection is that we were told during argument that they related - in this case - exclusively to a domestic organization. Footnote 13, SG's brief, states that - in addition to the sealed exhibit filed with the District Court below - the SG has lodged with the Clerk of this Court for its in camera inspection "the same exhibit we submitted to the Court of Appeals for the Ninth Circuit in the Ferguson case." The SG further states that the Ninth Circuit exhibit "consists of additional record(s) of conversations overheard during this surveillance," and that these show foreign involvement.

> "The defendant Plamondon has participated in conversations which were overheard by government agents who were monitoring wiretaps which were being employed to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government."

The affidavit does not track the language of § 2511(3). The danger described is limited to "attempts of domestic organizations to attack and subvert the existing structure of the government." There is no averment of danger of overthrow by force or of a "clear and present danger."

On the basis of the Attorney General's affidavit (and in the absence of other evidence), the courts below considered this case to involve only "domestic organizations", and they drew a distinction between a President's power with respect to national security where foreign governments are concerned, and his power where only domestic organizations are involved. (See Judge Keith's opinion A-30). The holding by the Sixth Circuit was as follows:

> "We hold that in dealing with the threat of domestic subversion, the Executive Branch . . . is subject to the limitations of the Fourth Amendment . . . ." (A-63)

The Court of Appeals expressly refrained from deciding whether there are limitations upon the President when he acts "under his constitutional powers as commander-in-chief . . . to defend this country

from attack, espionage or sabotage by forces or agents of a foreign power" (A-63). The Clay case (430 F. 2d 165) was distinguished on the ground that it involved "foreign intelligence surveillance."

Thus, on the skeletonized record in this case, we are concerned only (in the language of the Attorney General's affidavit) with "attempts of domestic organizations to attack and subvert the existing structure of the government." This specification probably does not come within the language of § 2511(3). It is to be borne in mind, however, that § 2511(3) is not an affirmative grant of power. Rather, it is at least an indication that Congress did not intend to act in the specified areas. At the most, the section is a Congressional acknowledgment of Presidential power in these areas without precise definition thereof. But if the Attorney General had stated a case within a general statutory grant of authority, I question whether the President has the same freedom to act against domestic threats as exists by virtue of his responsibility in foreign affairs and as commander-in-chief.

In view of the foregoing considerations, it is my tentative opinion that (i) the President (through the Attorney General) was not acting pursuant to any statutory authorization; (ii) no statutory

provisions purported to authorize the action taken;* and (iii) in the absence of statutory authority prescribing standards appropriate to the circumstances, the surveillance in this case violated the Fourth Amendment.

Perhaps I should add that in my view, the President's powers with respect to foreign affairs and as commander-in-chief are adequate to authorize him to act where in his judgment national security is endangered by activities of a foreign government. This would include the type of intelligence and counter-intelligence operations referred to in the statute. I think different considerations apply where the threat emanates solely from domestic sources. **

*The majority in the Sixth Circuit opinion expressed the view that § 2518(7)(a) of Title III provided a statutory procedure appropriate for this case. This subsection relates to "emergencies" and in my view was not intended to encompass intelligence surveillance of the type here involved. Nor do I think the provisions of § 2515(1)(a) with respect to espionage, sabotage and treason - all specific criminal offenses - are applicable to this case.

**There will no doubt be cases which are difficult to label as either "national security" or "domestic subversion." Footnote 13 of the SG's brief states that this distinction cannot be drawn in this case. Yet, on the record before us (unless the in camera exhibit materially alters the situation) the case is presented as involving neither national security nor the participation by foreign sources in domestic plots or subversion. I suppose the categorizing of cases, where the surveillance logs show varying degrees of foreign contacts, could become quite difficult. The extent and seriousness of the foreign involvement would, I suppose, be the controlling consideration.

This is not to say, however, that precisely the same protective standards prescribed by Title III (based on Katz) with respect to specified crimes are required where the government deems it necessary to conduct intelligence gathering operations against domestic subversion. The gathering of intelligence is usually long range and involves the interrelation of the various sources and types of information. The exact targets also are more difficult to identify than in surveillance operations against crime. Thus, standards which are different from those detailed in Title III may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of government for information and the protected rights of citizens. (Cf. Camara v. Municipal Court, 387 U. S. 523). Drawing a fair line may not be easy but it should not be impossible.

I suggested in the Conference, for example, that the application and affidavit showing probable cause need not be as particularized as in cases of specified crimes; that the request for prior court authorization could be made to any member of a designated court (e. g. the District Court or Court of Appeals for the District of Columbia); that the time limitation need not be as strict; and that the reporting requirements could be designed to protect adequately government sources as well as to assure Executive compliance.

If I write a draft opinion, as I am presently advised, it would be along the foregoing lines.

L. F. P., Jr.

May 3, 1972

PERSONAL

Re: No. 70-153 U. S. v. U. S. District Court

Dear Chief:

Here is my draft opinion in the domestic security wiretap case. I could not conclude, after further consideration, that this case is controlled by Title III.

Nor do I believe that it would be in the public interest - in the long run - if Title III were deemed controlling. Under that view, this particular case would still be affirmed - as the Attorney General's affidavit did not bring the case within the language of § 2511(3).

But let us assume that the next case which reaches the Court involves an affidavit which does track the exact language of the second sentence of § 2511(3). We could not then avoid the constitutional issue, which would include not only (i) the Fourth Amendment question but also (ii) a question as to impermissible vagueness and overbreadth. For the same reasons that caused the ABA Committee to draw a distinction between domestic security surveillance and foreign power surveillance, I think it inevitable that we would hold § 2511(3) unconstitutional.

Even if we have a choice now (which I really do not see), there are some considerations in favor of resolving the issue. Concern around the country as to warrantless surveillance is

genuine. There is uncertainty among the lower court, and in government itself as to the applicable constitutional standards. Moreover, an opinion along the lines I have drafted may prompt the Congress to address this issue at this session of Congress in a constructive way.

I am sure that all of these thoughts have occurred to you. Of course, if Byron is correct that the statute does control, the policy considerations I have mentioned are irrelevant. I have been unable to convince myself, however, that Byron's view can be supported.

One final comment: We did not discuss the government's request with respect to Alderman in the Conference. If and when we reconsider Alderman, I may well vote to overrule it for the reasons stated in the dissenting opinion. Certainly, I would limit its scope. I have discussed this with Byron and I do not think he is ready for a reconsideration. Accordingly, I concluded that it was best under the narrow facts in this case to follow Alderman but - by the last footnote - indicate that the story may not be finally written.

Sincerely,

The Chief Justice

lfp/ss

Please join me
Jm

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

From: Powell, J.

Circulated: MAY 3 1972

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 70–153

United States, Petitioner,
v.
United States District Court for the Eastern District of Michigan, Southern Division, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1972]

MR. JUSTICE POWELL delivered the opinon of the Court.

The issue before us is an important one for the people of our country and their national Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Resolving this question requires sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.

This case arises from a criminal proceeding in the United States District Court for the Eastern District of Michigan, in which the United States charged three defendants with conspiracy to destroy Government property in violation of 18 U. S. C. § 371. One of the defendants, "Pun" Plamondon, was charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan.

During pretrial proceedings, the defendants moved to compel the United States to disclose certain electronic

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 19, 1972

Re: 70-153 U. S. v. U. S. District Court

Dear Bill:

Thank you for yours of May 18. I am glad that my changes met your concerns.

I also appreciate your editing suggestions on pp. 13 and 14. The two sentences you mention in the paragraph beginning in the middle of p. 13 were based primarily upon studies which I commenced as a member of the President's Crime Commission and the Task Force thereof which considered organized crime problems and whether legalized wiretapping was necessary. In the course of that study I reviewed the testimony of former Attorneys General going back to Robert Jackson and extending through Robert Kennedy, all of whom agreed essentially that controlled surveillance is in the public interest.

You are quite right in saying that Ramsey Clark disagrees, and he so stated to the Crime Commission. I believe, however, that the annual reports to the Congress as to the effectiveness of wire-tapping under Title III (you are familiar with some of it in New Jersey) demonstrate its utility.

However, I have made a couple of changes in these sentences which make them relatively neutral. I believe that even Ramsey would agree that electronic surveillance is "effective" in many

Wm Brennan 5/19/71

situations. He questions whether its effectiveness is worth the financial cost and the incrimental intrusion upon privacy. The last sentence in the paragraph leaves us all perfectly free because of my having added the word "lawful". I hope these changes are satisfactory.

With my thanks.

Sincerely,

L

Mr. Justice Brennan

3 Changes P. 1, 3, 10, 12, 13, 14, 19, 23, 24, 25, 26.

Dissenting opinion

Changes Throughout

Joined 5/4

3rd DRAFT

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

From: Powell, J.

Circulated: MAY 22 1972

Recirculated:

SUPREME COURT OF THE UNITED STATES

No. 70–153

United States, Petitioner, *v.* United States District Court for the Eastern District of Michigan, Southern Division, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[May —, 1972]

MR. JUSTICE POWELL delivered the opinon of the Court.

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President's power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees,[1] without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government's right to protect itself from unlawful subversion and attack and to the citizen's right to be secure in his privacy against unreasonable Government intrusion.

This case arises from a criminal proceeding in the United States District Court for the Eastern District of Michigan, in which the United States charged three defendants with conspiracy to destroy Government property in violation of 18 U. S. C. § 371. One of the

[1] See n. 10, *infra*.