

FISA

ELECTRONIC SURVEILLANCE – CON LAW APPLIED

- President's Intelligence Authority
 - Derived from enumerated powers
 - As Commander in Chief
 - Collective Authority over foreign affairs
 - Take Care clause (faithful execution of the law and defense of the country and constitution)
 - Intelligence integral function of
 - military command
 - conduct of foreign affairs
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Steel Seizure Category?

- **Statutory**
- Congress has statutorily recognized President's intelligence authority
 - E.g., National Security Act charges head of CIA with “performing such other functions and duties relating to intelligence affecting national security as the President and the DNI may direct.”
 - Both President and the DNI are responsible for “ensuring the intelligence communities are fully kept informed of the intelligence activities of the United States.”
 - Implies the President is the originator, holder and administrator of intelligence gathering
- **Congressional Acquiescence**
- Presidents Act unilaterally without Congressional Objection
 - Roosevelt created the Office of Strategic Services (CIA precursor)
 - Truman established the NSA by exec order not during time of war or national emergency

Supreme Court view?

- 1875 Totten Suit
 - Contract action for fees claimed owed for services as a spy to the US (for Lincoln)
 - Dismissed – claimed contract not enforceable
 - BUT – no question of President’s authority to engage spies
 - Assumes such activities/relationships
- 2005 Tenet v. Doe
 - Reaffirms Totten as good law:
 - Judicial Review precluded in cases where claim depends upon the existence of a secret espionage relationship
 - Assumes such relationships
- Curtiss-Wright
 - President as the “sole organ” of foreign affairs that encompasses an intelligence function referenced as “confidential sources . . . Agents.”

Fourth Amendment and Electronic Surveillance

- **Olmstead (1928)**: Wiretapping not within the 4th A ambit which is oriented to protection of places, not persons
 - Limitation on the exercise of government power applies to physical intrusions (the Olmstead trespass doctrine)
 - Particular focus was invasion of the home.
- **Federal Communications Act (1934)**: Criminal ban on intercept and divulgence or publication of wire or radio communications
- **Nardone (1939)**: SC applied FCA to apply to federal agents such as to require exclusion from court of intercepts and fruits thereof

Fourth Amendment and Electronic Surveillance

- **Roosevelt DOJ:**
 - Construes *Nardone* to mean the G can wiretap
 - They just can't use it in court or publicly divulge outside the investigative context. Hmmm.
- **FDR Intelligence Wiretap Memo (1940):**
 - Electronic surveillance proper under the C where “grave matters of national defense are concerned
 - *That may include subversive activity in the United States*
 - “Insofar as possible” the government should attempt to limit it to aliens, i.e., non-AMCITS

Fourth Amendment and Electronic Surveillance

- 1967 – Katz
 - Bookie placing bets from a phone booth.
 - FBI listening in
 - Pre-Katz government would have been free to listen
 - Not a physical intrusion
 - Not a residence
 - Court says FBI should have presented matter to neutral magistrate for detached scrutiny
 - Holds 4th A protects people and not simply “areas” against unreasonable searches and seizures
 - 4th A reach thus no longer turns merely on presence/absence of physical intrusion
 - Standalone privacy interest in personal communications

Fourth Amendment and Electronic Surveillance

- 1967 – Katz
 - Advantages of proactive rather than reactive appraisal
 - Post-event review far less reliable
 - Too likely influenced by outcome
 - Too likely influenced by shortcomings of hindsight judgment/information
- 1968 - Title III
 - Addresses electronic surveillance *for law enforcement purposes*
 - LE uses 6 basic tools of surveillance
 - Electronic surveillance (wiretap)
 - Pen registers (outgoing)
 - Trap and trace (incoming)
 - Consensual Monitoring
 - Physical searches
 - Human surveillance
 - Informants

Title III

- Codifies Procedures for Law Enforcement ES
- Requires
 - Judicial Finding
 - Of Probable Cause to believe
 - Individual (target identity) is/has/is about to commit/ting/ed one of statutorily enumerated offenses
 - Evidence of subject crimes will be obtained from ES
 - PC means reason to believe
 - Less than preponderance; more than bare suspicion
 - Also requires
 - Specificity of time and place to be electronically surveilled
 - **Exhaustion Requirement:** normal investigative procedures to get information tried and failed or certain to fail if tried and why unlikely to succeed (Least intrusive means doctrine)
 - BUT - Foreign Intelligence Exception

Pen/Trap & Trace

- Does not require Probable Cause
- Merely based on certification submitted *ex parte* that information likely to be obtained is *relevant* to an ongoing criminal investigation
- Why?
 - Pen/Trap and Trace does not capture content
 - Reflective of the post-Katz focus on content and privacy expectation rather than location or facility (although both factor into the expectation of privacy analysis)
- Should we think about a higher evidentiary threshold?
 - 2009-11 orders for pen and trap authorizations increased by 60 percent
 - 23,535 in 2009 - 37,616 in 2011
 - Even more striking when compared with older figures
 - Between 2001 and 2011, there was a 6-fold increase
 - 5,683 in 2001 - 37,616 in 2011.
 - What that means is that more people were subjected to pen register and trap and trace surveillance in the latest 2 years of stats than the entire prior 10.

Pen/Trap & Trace

- **Should we consider a higher threshold?**
- With a pen/trap tap on your phone, the police can intercept:
 - The phone numbers you call
 - The phone numbers that call you
 - The time each call is made
 - Whether the call was connected, or went to voicemail
 - The length of each call
 - The subscriber information for calls coming and going
- That information is revealing enough on its own. But pen/traps aren't just for phones anymore
- Under the PATRIOT Act, the government can now use pen/trap orders to intercept information about your Internet communications as well. By serving a pen/trap order on your ISP or email provider, the police can get:
 - All email header information other than the subject line, including the email addresses of the people to whom you send email, the email addresses of people that send to you, the time each email is sent or received, and the size of each email that is sent or received.
 - Your IP (Internet Protocol) address and the IP address of other computers on the Internet that you exchange information with, with timestamp and size information.
 - The communications ports and protocols used, which can be used to determine what types of communications you are sending using what types of applications.
- Does this quantum of information suggestively constitute content

Approvals for Other LE Tools

- **Consensual Monitoring**
 - Feds: No court approval
 - States: Court approval
- **Physical searches**
 - Protected spaces – Court warrants establishing probable cause that a crime has occurred and evidence regarding that crime may reasonably be expected to be found at the specific location
 - Public areas – Free game
- **Human Surveillance**
 - Free game generally, with some circumstantial limitations
 - Invited: good to go anywhere
 - Uninvited – public areas only
 - Technological enhancements to human capacities
 - *S.Ct.GPS case/Beeper cases*
 - *Kyllo (thermal imaging search)*
- **Informants: Free Game**

US v. US District Court (Keith) - 1973

- Supreme Court held 4th Amendment applied to:
 - Electronic Surveillance for Domestic Security Purposes
 - Trial of individual charged with destruction of government property for setting off an explosive device outside a CIA facility in Ann Arbor
 - Request from defendant for any and all monitoring of his phones
 - Government declined to produce ES
 - Government also declined to produce to the trial court for *ex parte, in camera* review claiming national security surveillance not subject to warrant requirement or judicial review
 - AG affidavit said wiretap approved for purpose of gathering intelligence info deemed necessary to protect nation from attempts of domestic organizations to attack and subvert the existing structure of the USG

US v. US District Court (Keith) - 1973

- Supreme Court held:
 - Official surveillance,:
 - whether for criminal investigation or intelligence gathering
 - risks infringement of constitutionally protected privacy of speech
 - Security surveillances are especially sensitive because of:
 - Inherent vagueness of the domestic security concept
 - Necessarily broad and continuing nature of intelligence gathering
 - Temptation to utilize such surveillance to oversee political dissent
 - Domestic Intelligence involves a confluence of 1st & 4th Amendment interests/concerns
 - Bias in the field leans to collecting; especially when stakes are high or can be claimed as high
 - Title III statute already up and running
 - Government simply overplayed the intelligence exemption

US v. US District Court (Keith) - 1973

- Points of analytical Note:
 - Case did not involve foreign powers or foreign intelligence
 - Court reiterates Katz tenet: reasonableness of search is tied to:
 - Specific commands of the Warrant Clause (warrants shall issue, but upon probable cause”)
 - Detached, neutral, court review
- Olive Branch??
 - Did not hold the standards and procedures of Title III are necessarily applicable to domestic intelligence surveillance
 - Recognize domestic security may involve
 - Different policy and practical considerations from surveillance of “ordinary crime”
 - Often long-run monitoring, involving interrelated sources and types of info
 - Exact targets may be more difficult to identify than with Title III crimes
 - Domestic security surveillance is (and must often be) on **prevention** of unlawful activity or the enhancement of a Government’s preparedness for possible future crisis or emergency
 - Thus the focus of domestic surveillance may be less precise than for conventional crimes
 - Invite Congress to specify a Title III analog

COINTELPRO/CHURCH COMMITTEE

- Contemporaneous to Keith, Congress was holding public hearings to determine scope of domestic surveillance activity found:
 - Long and continuous practice of domestic eavesdropping by the FBI through its Cointelpro (Counterintelligence program) for:
 - Security and political purposes
 - Without warrants (approval by Hoover and aide Clyde Tolson)
 - Without Attorney General approval (or even notice)
 - Without probable cause
 - Without notice (even after the fact) – “black bag jobs”
 - Prominent Americans bugged without warrants:
 - MLK & Malcolm X;
 - Dr. Benjamin Spock (baby doc – anti-war activist);
 - Joan Baez (folk singer-anti-war activist)

Debating The Fix

- Ford Administration in internal conflict over the fix; specifically whether to subject foreign intelligence surveillance to some statutory modified warrant and judicial review requirement
 - Fear was extension of Keith to foreign intelligence
- **Pros:**
 - provide statutory protection to communications carriers;
 - We would see that issue arise later in the context of the terrorist surveillance program
 - remove question of validity of evidence obtained;
 - pre-empt imposition of overly burdensome/restrictive standards and procedures
- **Cons:**
 - unnecessary resort to judiciary for exercise of inherent exec authority;
 - troublesome delays or rejection of approvals in fast moving crises

Debating The Fix

- In the meantime, the Courts, working off of the *Keith/Title III* foreign intelligence exception uphold:
 - Use of take of incidental overhear of American on warrantless wiretap for foreign intelligence purpose. *US v. Brown*, (5th Cir. 1973)
 - Articulation of Primary Purpose Doctrine – warrantless surveillance in dual objective/use situations constitutional so long as the *primary purpose* is foreign intelligence. *US v. Butenko*, (3rd Cir. 1975)
 - *US v. Ehrlichman* (1973) – warrantless physical search of offices of psychiatrist to pull the files of a patient, Daniel Ellsberg, under indictment for revealing top secret docs – The Pentagon Papers (classified acct of US involvement in Vietnam)
 - Claimed by Def as legal because purpose was national security related
 - Court: no exigencies; no emergency – planned for weeks
 - Thus clearly illegal
 - Exception claimed as w/in the nat. sec. powers of the Pres.
 - Court: Pish Posh – exceptions were for elec. surveillance for foreign intelligence
 - Here, violation of rights through physical intrusion on personal space of American personally innocent of any criminal activity when items in his possession may touch upon foreign policy concerns “This would amount to a blank check to disregard the very heart and core of the Fourth Amendment and the vital privacy it protects.”

Debating the Fix

- *Ehrlichman* in DC Cir. More circumspect – no national security exception without specific authorization of the Pres or AG
 - Some notion of higher accountability at political actor level
 - Offset of inclination of those in the field invested in the inquiry
 - ***Is that a sufficient check?***
- Which is the more threatening or intrusive of privacy – physical entry of home or wiretap
- Where do computers lie on this spectrum?
 - Is a computer search a 4th A search?
 - Performed through remote access (thus not physically intrusive)
 - Not real time (after the fact)
 - Search is of physical ly documented manifestation of prior communication
 - Are computers like homes?

Debating the Fix

- Truong (4th Cir. 1982), apex of post-Keith, pre-FISA application of foreign intelligence exception
 - Espionage case; transmission of USG classified info to N. Vietnam in context of Paris Peace talks.
 - Warrantless phonetap; apartment bugging; 255 days
 - Challenged under 4th A. in motion to suppress
 - Foreign Intelligence exception
 - Authorized by AG
 - Foreign Intelligence Exception because
 - Speed, stealth, secrecy often at premium (255 days??)
 - Exec. Possesses unparalleled expertise in field of foreign intelligence, while judiciary is inexperienced
 - Exec constitutionally designated as pre-eminent authority in foreign affairs
 - Flexibility, practical experience, constitutional competence
 - However, only when object is foreign power and **primary** objective is foreign intelligence (rejecting sole purpose standard)

FISA – 50 USC 1801 et seq.

- Unwilling to bind the Pres to a definition and scope of the foreign intelligence exception
- Desirous of balancing
 - national security needs with
 - commitment to privacy and individual rights
 - within a structure that comports with due process and accountable standards:
- FISA – 50 USC 1801 et seq.

FISA – 50 USC 1801 et seq.

- Predicate threshold:
 - Probable cause to believe that:
 - “target of the electronic surveillance is a foreign power or an agent of a foreign power”
 - As compared to Title III, it does not require probable cause to believe that the target has or is about to commit a crime
 - Facility being/about to be used by FP or agent of
 - Like Title III– facility to be surveilled must be defined with specificity “if known” (lone wolf exception)
- Thus NO CRIME BUT, for US Citizen, there is a predicate act requirement tantamount to criminal activity

FISA – 50 USC 1801 et seq.

- Foreign Power:

- Foreign government or any part thereof
- A faction of a foreign nation not substantially composed of USPs
- Entity that openly acknowledged by a foreign G as being directed and controlled by For. G
- Group engaged in international terrorism
- Foreign based political org.
- Entity directed/controlled by foreign G

FISA – 50 USC 1801 et seq.

- FISA Surveillance Trigger for USP
 - 50/1801 - Agt of foreign power includes anyone who:
 - Knowingly engages in clandestine activities for a FP which involve violations of US criminal statutes
 - Knowingly engages in sabotage or international terrorism on behalf of a FP
 - Knowingly enters US under false or fraudulent identity for or on behalf of FP
 - Knowingly aids/abets *any* person or conspires to engage in above activities
 - **For USP, determination may not be made *solely* on the basis of 1st A. protected speech**
 - Although it may rely in part on them

FISA – 50 USC 1801 et seq.

- US Person:
 - Citizen; permanent resident alien; unincorporated association of individuals that includes a USC
- Minimization procedures:
 - Pertain to intended or inadvertent interception of communication of a US person
 - Names/identities of USPERs captured on surveillance shall be minimized unless necessary to understand foreign intelligence information
 - OR take is evidence of a crime that has been, is being, or is about to be committed
 - COMPARE to Title III minimization

FISA – 50 USC 1801 et seq.

- Process
 - FISC
 - Article III judges rotated in
 - Ex parte application, under seal to FISC
 - App must be approved by AG
 - App must establish: (1) info can't be obtained through other means
 - 72 Hour Emergency ES (50/1811)

FISA – 50 USC 1801 et seq.

- Entry of order with:
 - minimization requirements (if ES)
 - delimiting the information that may be gathered
 - Specifying time limit
- If take is to be used against “aggrieved person”
 - Notice
 - Right to ex parte, in camera review of app/warrant by d.ct
 - De novo review; app/order presumed valid
- HOW DOES A SOMEONE DEFEND AGST THIS?

FISA – 50 USC 1801 et seq.

- **FISA Pen/Trap & Trace**

- Simple showing of relevance
- Not to crime investigation but rather:
 - Information likely to be obtained is foreign intelligence information not concerning a USPER or is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities
 - PROVIDED: such investigation of USPER is not conducted *solely* on the basis activities protected by the 1st Amendment

- **FISA Searches (1994 amendment to Title 50)**

- Previously unaddressed and court the only containment
 - Ehrlichman (DDC 1974/76) –Ellsberg’ s psychiatrist’ s office/Pentagon Papers
 - D.Ct. national security break-ins unconstitutional
 - D.C. Cir. national security break-ins not excepted from 4th A. warrant requirement without approval of the President or AG
 - Is that an adequate substitute? (Richard Nixon/John Mitchell?)
- PC that target an agent of foreign power
- PC that premises is owned, used, possessed by AFP

The Wall

- Primary Purpose Doctrine
 - U.S. v. Truong (4th Cir. 1980)
 - Espionage/Conspiracy for transmittal of classified information to Viet Cong (from USIA)
 - Eavesdropping/Wiretapping devices/Pkg search
 - No warrant
 - Foreign intelligence exception invoked
 - *Keith* warrant requirement would be unduly frustrating to executing foreign affairs responsibilities, adding unneeded hurdles
 - To counter foreign threats requires
 - Stealth, speed and secrecy
 - Courts unschooled in foreign affairs and intelligence matters
 - Executive Branch has superior expertise

The Wall

- Acknowledges compromise to 4th A privacy Interests whenever G surveillance lacks prior judicial review
 - Thus foreign intelligence exception must be limited to paramount executive need
 - Relieved of warrant req only when object of search is a foreign power, its agent or collaborator of same
 - Equates with need for speed and stealth (compare to domestic)
 - Only when surveillance is conducted **primarily** for intel.
 - Once primarily criminal, Art III courts situated, expert to handle
 - Reject G request to make standard for intel any degree an objective
 - Def. says primary purpose not enough – Should be sole purpose
 - - Ct says “no” bcs :
 - most all for. Intel investigations are in part criminal investigations
 - Would fail to give adequate consideration and flexibility for the executive in the exercise of his foreign intelligence prerogative.
 - When investigation here determined to be on criminal track, warrantless activity ceased.

THE WALL

- What is the tip point for primary purpose?
 - Not really defined anywhere
- Truong/Primary purpose became the canon until 2002
- Permeability of Wall & 9/11
- 2002 – In re: Sealed Case (1st FISC APP ruling ever)
 - Significant Purpose (Patriot Act)
 - So long as G entertains realistic option of dealing with foreign agent other than through criminal prosecution, the test is satisfied.
 - (Re-affirms President's inherent authority to conduct warrantless searches to obtain foreign intelligence information)
 - Government's foreign powers do not recede merely because it is proceeding to criminal prosecution (as well) – not an either/or