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# "The Story of United States v. United States District Court (Keith): The Surveillance Power"

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Trevor W. Morrison

## The Story of *United States v. United States District Court (Keith)*: The Surveillance Power

May the President, acting in the interests of national security, authorize the electronic surveillance of persons within the United States without first obtaining a judicial warrant? The Supreme Court's first and still most important answer to that question came in *United States v. United States District Court for the Eastern District of Michigan, Southern Division*, better known as the *Keith* case.<sup>1</sup> In what the *New York Times* called "a stunning legal setback" for the government,<sup>2</sup> the Court concluded that "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch."<sup>3</sup> Thus, the Court held, a judicial warrant must issue before the government may engage in wiretapping or other electronic surveillance of domestic threats to national security. But the Court also limited its holding to cases involving "the domestic aspects of national security," and "express[ed] no opinion as to [the surveillance of the] activities of foreign powers or their agents."<sup>4</sup> Both in what it said and what it did not say, *Keith* has exerted great influence upon the judicial, legislative, and executive approaches to these issues in the years since.

*Keith* is also a great story. Arising in a period of great social and political unrest in this country, its cast of characters features "White Panther" radicals, famed civil liberties lawyers, Watergate accomplices, a federal judge as a named party, and a junior Justice whose opinion for the Court no one would have predicted. Before meeting those characters, however, we need some background both on the law and practice of national

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<sup>1</sup> 407 U.S. 297 (1972). As recounted below, "Keith" refers to Damon J. Keith, the federal district judge in the case.

<sup>2</sup> Fred P. Graham, *High Court Curbs U.S. Wiretapping Aimed at Radicals*, *N.Y. Times*, June 20, 1972, at A1.

<sup>3</sup> *Keith*, 407 U.S. at 316-17.

<sup>4</sup> *Id.* at 321-22.

security surveillance in general and on the circumstances giving rise to the *Keith* case in particular.

### *National Security Surveillance*

When the *Keith* case arose in the early 1970s, warrantless wiretapping—that is, the electronic interception of telephone and other private communications—for purposes of national security was not a recent innovation. Indeed, “[s]uccessive Presidents for more than one-quarter of a century ha[d] authorized such surveillance in varying degrees.”<sup>5</sup> The first President to do so was Franklin Roosevelt. In 1940, he signed a memorandum empowering Attorney General Robert Jackson to direct government agents “to secure information by listening devices direct[ed] to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies.”<sup>6</sup>

Although it is unclear whether Roosevelt’s authorization covered surveillance of wholly domestic entities,<sup>7</sup> in 1946 President Truman made that authority clear by approving the use of wiretapping and other “special investigative measures . . . in cases vitally affecting the domestic security, or where human life is in jeopardy.”<sup>8</sup> As the Supreme Court later explained, “[t]he [warrantless] use of such surveillance in internal security cases [was] sanctioned more or less continuously by various Presidents and Attorneys General” from the time of Truman’s authorization until the Court decided *Keith*.<sup>9</sup>

When these surveillance policies were first put in place, there was no particular reason to think they implicated the Fourth Amendment’s warrant requirement.<sup>10</sup> Under *Olmstead v. United States*,<sup>11</sup> the Fourth Amendment was understood to restrict only

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<sup>5</sup> *Id.* at 299.

<sup>6</sup> Memorandum from President Franklin D. Roosevelt to Robert Jackson, Att’y Gen. (May 21, 1940), reprinted in *Hearings Before the Senate Committee on the Judiciary on the Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to be Associate Justices of the Supreme Court of the United States*, 92d Cong. 254 (1971) [hereinafter “Powell Hearings”], available at <http://www.gpoaccess.gov/congress/senate/judiciary/sh92-69-267/browse.html>.

<sup>7</sup> See *Keith*, 407 U.S. at 310-11 n.10 (noting this uncertainty).

<sup>8</sup> Letter from Tom C. Clark, Att’y Gen., to President Harry S. Truman (Jul. 17, 1946), reprinted in *Powell Hearings* at 255. Truman’s handwritten approval, appended to the bottom of Clark’s letter, is dated July 17, 1947. That seems to have been an error. Cf. *Keith*, 407 U.S. at 310 (treating 1946 as the date of Truman’s authorization).

<sup>9</sup> *Keith*, 407 U.S. at 310. The only apparent exception came during the latter part of the Johnson administration, when Attorney General Ramsey Clark “sharp[ly] curtail[ed]” the warrantless use of electronic surveillance. *Id.* at 310-11 n.10.

<sup>10</sup> The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched.” U.S. Const. amend. IV.

<sup>11</sup> 277 U.S. 438 (1928).

physical trespasses. Under *Olmstead*, then, electronic surveillance not accompanied by some physical intrusion was simply not a Fourth Amendment event.<sup>12</sup>

In 1967, the Supreme Court overruled *Olmstead* in *Katz v. United States*.<sup>13</sup> *Katz* extended the Fourth Amendment's coverage to nontrespassory surveillance, rendering most warrantless electronic interceptions of private communications constitutionally unreasonable.<sup>14</sup> But the Court also confined its holding to the use of surveillance for ordinary law enforcement purposes; it expressed no opinion on “[w]hether safeguards other than prior authorization by a magistrate [that is, the issuance of a warrant] would satisfy the Fourth Amendment in a situation involving the national security.”<sup>15</sup>

Legislative efforts by Congress in the late 1960s also avoided national security-based surveillance. In 1968, responding both to *Katz* and to the growing awareness that wiretapping and other forms of electronic surveillance were both vital law enforcement tools and substantial potential threats to individual privacy, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act.<sup>16</sup> As a general matter, the act prohibited wiretapping and electronic surveillance by anyone other than a duly authorized law enforcement officer, the Federal Communications Commission, or communications common carriers engaged in certain monitoring as part of their normal business practices. As for law enforcement, the act authorized the use of electronic surveillance, pursuant to a prior court order, in a limited set of criminal cases.<sup>17</sup> It laid out the kind of detailed and particularized showing required to obtain a court order, and it imposed certain conditions on the use of the authority conferred by the order.<sup>18</sup> In short, as the *Keith* Court later put it, the act was “a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression.”<sup>19</sup>

Like the Supreme Court in *Katz*, however, Congress conspicuously avoided any pronouncement on national security-based surveillance. Instead, it included a provision that amounted to a national security disclaimer:

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, [or] to obtain foreign intelligence information deemed

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<sup>12</sup> Some instances of electronic surveillance might be accompanied by a physical invasion into the target's home, in order, for example, to install certain electronic, video, or audio equipment. Even under *Olmstead*, cases of that sort would have triggered the Fourth Amendment.

<sup>13</sup> 389 U.S. 347 (1967).

<sup>14</sup> *Id.* at 353, 356-57.

<sup>15</sup> *Id.* at 358 n.23.

<sup>16</sup> 18 U.S.C. §§ 2510-20.

<sup>17</sup> *Id.* § 2516.

<sup>18</sup> *Id.* § 2518.

<sup>19</sup> *Keith*, 407 U.S. 297, 302 (1972).

essential to the security of the United States . . . . Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deemed 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.<sup>20</sup>

Yet just as this provision made clear Congress’s intention not to limit the President’s authority to act in the interests of national security, nothing in the act *enhanced* his authority to do so. Congress, in other words, simply took no position on whether the President had that power, nor on whether or when such power might be subject to Fourth Amendment or other constitutional limits.

In sum, by the time *Keith* came to the Court, it was clear that electronic surveillance for ordinary law enforcement purposes triggered the Fourth Amendment’s warrant requirement. Title III also imposed various statutory restrictions on such surveillance. It was equally clear, though, that Title III did not apply to national security-based surveillance. What was not clear—and what became the central question in the case—was whether national security surveillance qualified for an exception to the Fourth Amendment’s warrant requirement.

The case did not set up that way when it began, however. The next section addresses those beginnings.

### *Lawrence “Pun” Plamondon*

The *Keith* case started as a criminal prosecution of Lawrence “Pun” Plamondon, John Sinclair, and John Waterhouse Forrest in connection with the bombing of a CIA office in Ann Arbor, Michigan.<sup>21</sup> Events relating to Plamondon in particular became the focal point of the surveillance component of the case. His story is part of the *Keith* story.

Life did not start easily for Plamondon. Born in 1945 to an alcoholic father and a syphilitic mother while both were institutionalized in a Michigan state mental hospital,<sup>22</sup> he was raised by adopted parents and eventually left home in his teens.<sup>23</sup> He was in frequent legal trouble: Between 1962 and 1966 he was arrested fourteen times in four different states and Canada for offenses ranging from underage consumption of alcohol to assault and battery.<sup>24</sup> At age 21 he found himself in Detroit.<sup>25</sup> It was 1967, the year of

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<sup>20</sup> 18 U.S.C. § 2511(3) (1976), *repealed by* Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801 *et seq.*).

<sup>21</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 1 (2003).

<sup>22</sup> See Pun Plamondon, *Lost from the Ottawa: The Story of the Journey Back* 16 (2004).

<sup>23</sup> *Id.* at 35-37; see also Marsha Low, *60s Radical Takes Long Trip Back to His Roots: White Panthers’ Plamondon Surfaces with Memoir*, Detroit Free Press, Oct. 27, 2004, at B1.

<sup>24</sup> See Pun Plamondon, *Lost from the Ottawa: The Story of the Journey Back* 52-53 (2004).

Detroit's 12th Street Riot and a time of great unrest. Plamondon soon fell in with a group of "counterculture" artists, activists, and writers including John Sinclair, the founder of the Detroit Artists Workshop.<sup>26</sup> He "made sandals for money," and "[a]t night be dropped acid, smoked pot and ate hallucinogenic mushrooms while listening to the MC5, The Doors, and Iggy and the Stooges."<sup>27</sup>

Plamondon, Sinclair, and others moved to Ann Arbor in 1968.<sup>28</sup> They lived there in a kind of commune. At around that time, Plamondon read a newspaper interview with Huey P. Newton, a leader of the Black Panther Party, who told the reporter that if white people wanted to support the Black Panthers, "[t]hey can form a White Panther Party."<sup>29</sup> Plamondon and Sinclair soon did just that, with Sinclair serving as Chairman and Minister of Information and Plamondon as Minister of Defense.<sup>30</sup> The "White Panther Manifesto," which Sinclair wrote in 1968, declared the group's mission:

Our program is Cultural Revolution through a total assault on the culture, which makes us use every tool, every energy and any media we can get our collective hands on. . . . Our culture, our art, the music, newspapers, books, posters, our clothing, our homes, the way we walk and talk, the way our hair grows, the way we smoke dope and fuck and eat and sleep—it is all one message, and the message is FREEDOM! . . . We demand total freedom for everybody! And we will not be stopped until we get it. . . . ROCK AND ROLL music is the spearhead of our attack because it is so effective and so much fun. . . . With our music and our economic genius we plunder the unsuspecting straight world for money and the means to carry out our program, and revolutionize its children at the same time.<sup>31</sup>

On September 29, 1968, a bomb exploded in front of a CIA recruitment office in Ann Arbor.<sup>32</sup> Shortly after the bombing, Plamondon went underground. He traveled across the country and the world for nearly a year, "bouncing from San Francisco to Seattle to New York to Toronto, Germany, Italy, and Algeria."<sup>33</sup> In Algeria he spent time

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<sup>25</sup> See Marsha Low, *60s Radical Takes Long Trip Back to His Roots: White Panthers' Plamondon Surfaces with Memoir*, Detroit Free Press, Oct. 27, 2004, at B1.

<sup>26</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 8 (2003).

<sup>27</sup> Marsha Low, *60s Radical Takes Long Trip Back to His Roots: White Panthers' Plamondon Surfaces with Memoir*, Detroit Free Press, Oct. 27, 2004, at B1.

<sup>28</sup> *Id.*

<sup>29</sup> Pun Plamondon, *Lost from the Ottawa: The Story of the Journey Back* 114-15 (2004).

<sup>30</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 1, 8 (2003).

<sup>31</sup> Reprinted in *id.* at 3.

<sup>32</sup> *Id.* at 1.

<sup>33</sup> Marsha Low, *60s Radical Takes Long Trip Back to His Roots: White Panthers' Plamondon Surfaces with Memoir*, Detroit Free Press, Oct. 27, 2004, at B1.

with members of the Black Panthers living in self-imposed exile there.<sup>34</sup> By the middle of 1969, Plamondon was on the Federal Bureau of Investigation's "Ten Most Wanted" list.<sup>35</sup>

In the fall of 1969, a federal grand jury returned indictments against Plamondon, Sinclair, and Forrest.<sup>36</sup> It charged them with conspiring to destroy government property, and additionally charged Plamondon with destroying government property in connection with the CIA office bombing.<sup>37</sup> Plamondon was still on the lam at that point, but he soon grew tired of life abroad and returned to Michigan.<sup>38</sup> He evaded the authorities' notice for a while. But when a state trooper observed empty beer cans being thrown out of a Volkswagen van as it traveled down the highway, he pulled it over to find Plamondon and two other White Panthers inside.<sup>39</sup> The trooper soon saw through Plamondon's false identification, realized who he was, and arrested him.<sup>40</sup>

Later recalling the beer cans, Plamondon told the *Detroit Free Press* that his arrest was due to a "lack of revolutionary discipline."<sup>41</sup>

### *The Case in the Lower Courts*

The case against Plamondon, Sinclair, and Forrest was filed in the U.S. District Court for the Eastern District of Michigan, in Detroit. It was randomly assigned to Judge Damon J. Keith.<sup>42</sup> Appointed to the bench in 1967, Judge Keith would go on to serve as Chief Judge of his district from 1975 to 1977. He was elevated to the U.S. Court of Appeals for the Sixth Circuit in 1977 and remains on that court today (having taken senior status in 1995).

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<sup>34</sup> See Pun Plamondon, *Lost from the Ottawa: The Story of the Journey Back 195-205* (2004).

<sup>35</sup> See Marsha Low, *60s Radical Takes Long Trip Back to His Roots: White Panthers' Plamondon Surfaces with Memoir*, *Detroit Free Press*, Oct. 27, 2004, at B1.

<sup>36</sup> See *United States v. United States District Court*, 444 F.2d 651, 653 (6th Cir. 1971). Quoting the government's statement of facts in its petition, the Sixth Circuit's opinion identifies the date of the indictment as December 7, 1969. *Id.* Damren, however, sets the date as October 7, 1969. See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 1 (2003). Nothing material turns on this discrepancy.

<sup>37</sup> *United States District Court*, 444 F.2d at 653.

<sup>38</sup> "I was a fish out of water," Plamondon explained to a reporter in 2004. "There were no hippie girls, no hippie guys, no rock 'n roll, no beer. I was lonely and homesick. I came home unannounced." Marsha Low, *60s Radical Takes Long Trip Back to His Roots: White Panthers' Plamondon Surfaces with Memoir*, *Detroit Free Press*, Oct. 27, 2004, at B1.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> See *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971).

The United States Attorney in charge of the case was Ralph Guy, whom President Nixon had appointed to the position in 1970.<sup>43</sup> He went on to join Judge Keith as a judge on the U.S. District Court for the Eastern District of Michigan and, like Keith, was later elevated to the Sixth Circuit.<sup>44</sup>

On the defense side, Sinclair and Plamondon were represented by famed civil liberties lawyers William Kuntsler and Leonard Weinglass.<sup>45</sup> Forrest was represented by a young lawyer from the National Lawyers Guild named Hugh Davis.<sup>46</sup> Kuntsler and Weinglass had already gained substantial notoriety for their defense of the Chicago Seven, a group of political radicals charged with conspiring to incite a riot at the 1968 Democratic National Convention in Chicago.<sup>47</sup> As in the Chicago case, the defense team saw the prosecution as a “politically motivated” attack, this time against the White Panther Party.<sup>48</sup>

The government’s principal witness in the case was one David Valler, who had earlier pleaded guilty to a separate bombing and was currently in prison for that and other offenses.<sup>49</sup> Linked by the media to a number of other Detroit-area bombings during that period, Valler told authorities that he had supplied the explosives used in the Ann Arbor bombing.<sup>50</sup> He was evidently prepared to implicate some or all of the defendants in a conspiracy to carry out the attack. But there were substantial reasons to doubt his credibility. Defense counsel claimed that Valler himself had made numerous statements in which he questioned his own sanity. They filed a motion challenging Valler’s competency and requesting a psychiatric evaluation. Judge Keith denied the motion, reasoning that the defense’s arguments went to Valler’s credibility and not his basic competency.<sup>51</sup> The jury could consider those issues when deciding how much weight to give to his testimony.

In October 1970, still before trial, the defense filed a motion seeking “all [government] logs, records, and memoranda of electronic surveillance directed at any of

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<sup>43</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 1, 7 (2003).

<sup>44</sup> *Id.* at 7.

<sup>45</sup> *Id.* at 1.

<sup>46</sup> *Id.*

<sup>47</sup> See *Judge Keith, the Constitution, and National Security from Haddad to Sinclair*, 5 J. L. Soc’y 359, 386 (2004) (remarks of Judge Keith) [hereinafter “Keith Remarks”].

<sup>48</sup> *Judge Keith, the Constitution, and National Security from Haddad to Sinclair*, 5 J. L. Soc’y 359, 370 (2004) (remarks of Hugh M. Davis, defense counsel for Forrest in the *Keith* case) [hereinafter “Davis Remarks”].

<sup>49</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 3 (2003).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*



the defendants or co-conspirators not indicted.”<sup>52</sup> A supporting affidavit by attorney Kuntsler stated that although he had no direct knowledge of electronic surveillance in this particular case, he knew of other instances in which the government had conducted illegal surveillance of supposed counterculture radicals.<sup>53</sup> In addition to disclosure of any such surveillance in this case, the defense also requested a hearing “to determine whether any of the evidence upon which the indictment is based or which the Government intends to introduce at trial is tainted by such surveillance.”<sup>54</sup> The motion was based in part on the Supreme Court’s decision in *Alderman v. United States*,<sup>55</sup> which held that the government must disclose to the defense evidence of any conversations the defendant participated in or that occurred on his premises which the government monitored or overheard during illegal surveillance. Disclosure, in other words, is required when the surveillance in question was done illegally. And the point of the disclosure is to determine whether any illegally obtained information has tainted the evidence upon which the government is relying in the case at bar.

In response to the disclosure motion, U.S. Attorney Guy and his prosecution team entered into a stipulation with the defense.<sup>56</sup> The prosecutors stated that they had no knowledge of any electronic surveillance of any of the defendants, but that they had asked the Justice Department to check with the FBI in Washington to see if it had any record of any such surveillance.<sup>57</sup> If those requests produced anything, the prosecutors stipulated that they would turn the information over to Judge Keith for his inspection.<sup>58</sup>

The complexion of the case began to change on December 14, 1970, when the government filed an affidavit signed by United States Attorney General John Mitchell. In it, Mitchell acknowledged that “[t]he 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.”<sup>59</sup> The wiretaps had been authorized by the Attorney General but not by any court. In compliance with the earlier stipulation, the government submitted the logs of the surveillance to Judge Keith for his *in camera* inspection. But it refused to disclose them to the defense on the ground that doing so would “prejudice the national interest.”<sup>60</sup>

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<sup>52</sup> *United States v. Sinclair*, 321 F. Supp. 1074, 1076 (E.D. Mich. 1971).

<sup>53</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 4 (2003).

<sup>54</sup> *Id.*

<sup>55</sup> 394 U.S. 165 (1969).

<sup>56</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 5 (2003).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Keith*, 407 U.S. 297, 300 n.2 (1972) (reprinting the affidavit).

<sup>60</sup> *Id.*

As discussed below, the government held fast to that refusal even after losing the case at the Supreme Court. Thus, it is difficult to know for certain what the “overheard” conversations in question were all about. The government repeatedly stressed that “Plamondon was not the object of the surveillance,” and that the Attorney General’s authorization of the wiretaps was not designed to collect information about Plamondon.<sup>61</sup> It is reasonable to infer, then, that Plamondon was overheard having conversations with some other person or persons who were the object of the surveillance, or who were present at a location targeted by the surveillance. Decades after the trial, Hugh Davis (who had represented Forrest in the trial) offered one possibility along those lines:

I believe [the surveillance] was a National Security Agency intercept from when Pun Plamondon was in Algeria with [Black Panther leader] Eldridge Cleaver, who was also on the run. They were calling Huey Newton at the Black Panther headquarters in Oakland. And . . . if we’d have had a taint hearing, I think we would have lost [because the conversations had nothing to do with the Ann Arbor bombing].<sup>62</sup>

The government, however, did not try to win the battle at a taint hearing. Instead, it simply refused to disclose the logs, arguing that the surveillance was perfectly legal and thus that it was under no obligation of disclosure. Specifically, the government contended that the combination of the Attorney General’s affidavit and the sealed logs established that although the surveillance was conducted without prior judicial approval, it was “a reasonable exercise of the President’s power (exercised through the Attorney General) to protect the national security.”<sup>63</sup> In other words, the government answered the question left open in *Katz* by arguing that national security was indeed an exception to the general Fourth Amendment requirement that the government obtain advance judicial approval before engaging in electronic surveillance.

Judge Keith disagreed. Stressing that “[w]e are a country of laws and not of men”<sup>64</sup> and that “the Constitution is the Supreme Law of the Land,”<sup>65</sup> he saw no basis for exempting presidentially authorized electronic surveillance from the requirements of the Fourth Amendment. The Fourth Amendment’s warrant requirement ensures that assertions of government power are checked by the objective review of an independent magistrate, and Judge Keith was “loath to tolerate” replacing that check with an arrangement in which “law enforcement officials would be permitted to make their own evaluation as to the reasonableness [of the] . . . search” in question.<sup>66</sup>

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<sup>61</sup> United States v. United States District Court, 444 F.2d 651, 653 n.1 (6th Cir. 1971).

<sup>62</sup> Davis Remarks at 370.

<sup>63</sup> *Id.* at 301.

<sup>64</sup> United States v. Sinclair, 321 F. Supp. 1074, 1077 (E.D. Mich. 1971).

<sup>65</sup> *Id.* at 1078.

<sup>66</sup> *Id.* at 1078-79.

Although he did not develop the point at length, Judge Keith also drew a distinction between surveillance targeting purely domestic entities and surveillance targeting foreign powers:

An idea which seems to permeate much of the Government's argument is that a dissident domestic organization is akin to an unfriendly foreign power and must be dealt with in the same fashion. There is great danger in an argument of this nature for it strikes at the very constitutional privileges and immunities that are inherent in United States citizenship. It is to be remembered that in our democracy all men are to receive equal justice regardless of their political beliefs or persuasions. The executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because certain accused persons espouse views which are inconsistent with our present form of government.<sup>67</sup>

Judge Keith's distinction between domestic and foreign intelligence-gathering can be read in at least two different ways. One way is to stress the passage referring to the constitutional rights that come with being a citizen of the United States. Yet citizenship itself generally does not mark the boundary of the Fourth Amendment's protections; non-citizens prosecuted in U.S. courts enjoy the Amendment's protections just as citizens do. Another (perhaps more descriptively accurate and normatively attractive) reading would treat the distinction as having to do with whether the government's actions have any proximate connection to the domestic criminal justice system, without regard to the citizenship of those involved. On this reading, the point is that the Fourth Amendment must apply fully to "dissident domestic organization[s]" precisely because such organizations are subject to the domestic criminal justice system. "[F]oreign power[s]," on the other hand, are not likely to face prosecution in the U.S. courts. More generally, the domestic sovereign's relationship to them is qualitatively different than it is to domestic individuals and organizations. Thus, it makes sense from this perspective to distinguish between domestic and foreign targets of the government's surveillance efforts.

The rule embraced by Judge Keith did precisely that: "[I]n wholly domestic situations, there is no national security exemption from the warrant requirement of the Fourth Amendment."<sup>68</sup> Phrased this way, the rule carried no necessary implications for national security surveillance in situations involving foreign powers or that were otherwise not purely domestic. But because the Attorney General's affidavit described *this* case in "wholly domestic" terms, and because the surveillance in this case took place

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<sup>67</sup> *Id.* at 1079.

<sup>68</sup> 321 F. Supp. at 1080 (quoting *United States v. Smith*, 321 F. Supp. 424, 429 (C.D. Cal. 1971)). *Smith* was a district court case that involved the same issues as the case before Judge Keith, complete with an identical Attorney General affidavit. The author of the *Smith* opinion was Judge Warren Ferguson. In several places in his opinion, Judge Keith stressed his agreement with and admiration for Judge Ferguson's reasoning. *See, e.g., id.* at 1077 (calling the *Smith* opinion "[p]articularly noteworthy" and "exceptionally well-reasoned and thorough").

without a judicially issued warrant, it violated the Fourth Amendment. Accordingly, under *Alderman* Judge Keith ordered the government to disclose to Plamondon his overheard conversations.

The government acted quickly to challenge Judge Keith's order before the U.S. Court of Appeals for the Sixth Circuit. Because it was a pretrial interlocutory order, the judge's order was not immediately subject to a conventional appeal.<sup>69</sup> In addition, it fell outside the limited set of interlocutory orders that Congress had singled out as immediately appealable.<sup>70</sup> So the ordinary appellate avenues were unavailable. There were other avenues, however, and the government took one of them. Relying on the jurisdiction conferred by the All Writs Act,<sup>71</sup> the government pursued its appeal in the form of a petition for a writ of mandamus. This move made the district court below (and Judge Keith himself) the respondent in the case before the appellate courts, which is how *Keith* got its name.

A divided three-judge panel of the Sixth Circuit denied the government's petition, thus upholding Judge Keith's order.<sup>72</sup> The court did agree to review the case via mandamus, stressing that "this is in all respects an extraordinary case," that "[g]reat issues are at stake for all parties concerned," and that the government claimed that affirming the disclosure order will have the effect of forcing the government to dismiss the case against Plamondon.<sup>73</sup> On this last point, the government was thus saying that it would never publicly disclose the surveillance logs. If the disclosure order stood, the government would simply abandon its case against Plamondon.<sup>74</sup> Thus, although the government contended—and no one meaningfully disputed—that the surveillance in question was never targeted at Plamondon and was not conducted with the purpose of developing evidence for any criminal case against him, the legality of the surveillance became the decisive factor in whether his case would proceed at all.

On the merits, the Sixth Circuit reached the same conclusion as Judge Keith. It summarized the basic inadequacy of the government's position as follows:

The government has not pointed to, and we do not find, one written phrase in the Constitution, in the statutory law, or in the case law of the United States, which

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<sup>69</sup> See 28 U.S.C. § 1291; see also 18 U.S.C. § 3731 (addressing criminal appeals in particular).

<sup>70</sup> See *id.* § 1292.

<sup>71</sup> 28 U.S.C. § 1651.

<sup>72</sup> *United States v. United States District Court*, 444 F.2d 651 (6th Cir. 1971).

<sup>73</sup> *Id.* at 655.

<sup>74</sup> The government confirmed this point in its petition for certiorari to the Supreme Court. See Petition for a Writ of Certiorari at 5, *United States v. United States District Court (Keith)*, 407 U.S. 297 (2003) (No. 07-153), reprinted in *72 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law* 554 (Philip B. Kurland & Gerhard Casper eds., 1975) (No. 1687) [hereinafter "Landmark Briefs"].

exempts the President, the Attorney General, or federal law enforcement from the restrictions of the Fourth Amendment in the case at hand.<sup>75</sup>

Accordingly, the court embraced a rule quite similar to the one articulated by Judge Keith: “[I]n dealing with the threat of domestic subversion, the Executive Branch of our government . . . is subject to the limitations of the Fourth Amendment . . . when undertaking searches and seizures for oral communications by wire.”<sup>76</sup> Like Judge Keith’s rule, this rule was limited to domestic cases. Situations involving “forces or agents of a foreign power” were a different matter, and the court expressed no view on them.<sup>77</sup>

The Sixth Circuit issued its decision on April 8, 1971. The government quickly sought certiorari from the Supreme Court, and certiorari was granted on June 21 of that year.

### *Justice Powell and Wiretapping*

The Supreme Court that decided *Keith* was a Court in flux. Hugo Black and John Marshall Harlan, two longstanding members of the Court, had recently departed. Their replacements, Lewis Powell and William Rehnquist, arrived after certiorari had already been granted in *Keith*. That point was not lost on the Senate as it considered the nominations, especially Powell’s. Indeed, the case was referenced on numerous occasions during Powell’s confirmation hearings, and he faced extensive questioning about his views on wiretapping and related surveillance matters.

Powell had a paper trail on wiretapping in particular as well as criminal justice more generally. He came to national prominence in 1964 upon becoming president of the American Bar Association.<sup>78</sup> And “[a]lthough Powell had never prosecuted or acted as defense counsel in a criminal case, as ABA president, ‘[m]ostly, he talked about crime.’”<sup>79</sup> In doing so, Powell often staked out strong law-and-order positions and expressed criticism of some of the Warren Court’s rulings on issues of constitutional criminal procedure.<sup>80</sup> In 1965, President Johnson appointed Powell to a newly established Commission on Law Enforcement and the Administration of Justice.<sup>81</sup> In 1967, the Commission issued a report entitled *The Challenge of Crime in a Free*

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<sup>75</sup> *United States District Court*, 444 F.2d at 665.

<sup>76</sup> *Id.* at 667.

<sup>77</sup> *Id.*

<sup>78</sup> See John C. Jeffries, Jr., *Justice Lewis F. Powell* 194 (1994) (“Becoming president of the ABA put Powell on the national map.”).

<sup>79</sup> Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1269 (2008) (quoting *id.* at 210).

<sup>80</sup> *Id.*

<sup>81</sup> See Powell Hearings at 206-07 (describing the Commission’s work).

*Society*.<sup>82</sup> One of the Commission’s recommendations was for Congress to pass legislation regulating the use of wiretaps in criminal cases, which helped pave the way for Title III of the Omnibus Crime Control and Safe Streets Act of 1968, discussed above.<sup>83</sup> The Commission was careful to note, however, that “matters affecting the national security not involving criminal prosecution” fell outside its mandate, and that its wiretapping-related recommendations were not meant to apply in that context.<sup>84</sup>

Powell also served on a Criminal Justice Committee of the American Bar Association that, shortly before his nomination to the Court, issued a set of recommended standards for the regulation of wiretapping and related surveillance activities.<sup>85</sup> The Committee Report expressly approved electronic surveillance without prior judicial approval in cases involving a “foreign power”:

The use of electronic surveillance techniques by appropriate federal officers for the overhearing or recording of wire or oral communications to protect the nation from attack by or other hostile acts of a foreign power or to protect military or other national security information against foreign intelligence activities should be permitted subject to appropriate Presidential and Congressional standards and supervision.<sup>86</sup>

The Report took no formal stance on the President’s authority to order warrantless surveillance in purely *domestic* cases. Yet the Committee was not entirely silent on that issue. The commentary to the Report stated that the Committee “rejected any reading of the fourth amendment that would invariably require compliance with a court order system before surveillance in interest[s] [of] national security could be termed constitutionally reasonable.”<sup>87</sup> Even without adopting any firm affirmative position, that rejection placed the Committee—and, thus, Powell—at odds with the decisions of the lower courts in

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<sup>82</sup> President’s Comm’n on Law Enforcement & Admin. of Justice, *The Challenge of Crime in a Free Society* (1967).

<sup>83</sup> *Id.* at 473. This recommendation was made by a majority of the Commission, including Powell, but was not unanimous. Dissenting members agreed that the current state of the law of electronic surveillance was a disorganized mess, but harbored “serious doubts about the desirability” of federal wiretap legislation. *Id.* For further discussion of the Commission’s recommendations on this point, see Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1270-71 (2008).

<sup>84</sup> President’s Comm’n on Law Enforcement & Admin. of Justice, *The Challenge of Crime in a Free Society* 473 (1967); see Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1271 (2008).

<sup>85</sup> See ABA Project on Minimum Standards for Criminal Justice, *Standards Relating to Electronic Surveillance* § 3.1 (Approved Draft 1971).

<sup>86</sup> *Id.* § 3.1.

<sup>87</sup> *Id.* § 3.1 cmt. at 12. For more on the Committee’s position, see Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1273 & n.62 (2008).

*Keith*. As noted below, however, Powell would later claim during his confirmation hearings that the Committee simply “did not address the far more troublesome area of internal security surveillance.”<sup>88</sup>

Powell’s most significant statements on the surveillance issue were made in his personal capacity, not as part of any commission or committee. In an April 15, 1971 speech to the Richmond Bar Association,<sup>89</sup> Powell reiterated the view that the President had the power to order warrantless surveillance in national security cases involving foreign threats, but noted that “the President’s authority with respect to internal security is less clear.”<sup>90</sup> Powell went on, however, to question the stability of the foreign/domestic distinction as “far less meaningful now that radical [domestic] organizations openly advocate violence.”<sup>91</sup>

Powell reiterated that point in even sharper terms in an August 1, 1971 op-ed in the *Richmond Times-Dispatch*, entitled “Civil Liberties Repression: Fact of Fiction?”<sup>92</sup> The piece was in many respects a refutation of the growing concern among civil libertarians over the government’s use of wiretapping. Powell’s description of the controversy, including his reference to the *Keith* case itself, is worth quoting at length:

Civil libertarians oppose the use of wiretapping in all cases, including its use against organized crime and foreign espionage. Since [enactment of Title III of] the 1968 Act, however, the attack has focused on its use in internal security cases and some courts have distinguished these from foreign threats. The issue will be before the Supreme Court at the next term.

There can be legitimate concern whether a president should have this power with respect to internal ‘enemies.’ There is, at least in theory, the potential for abuse. This possibility must be balanced against the general public interest in preventing violence (e.g. bombing the Capitol) and organized attempts to overthrow the government.

.....

There may have been a time when a valid distinction existed between external and internal threats. But such a distinction is now largely meaningless. The radical left, strongly led and with a growing base of support, is plotting violence and revolution. Its leaders visit and collaborate with foreign Communist enemies. Freedom can be lost as irrevocably from revolution as from foreign attack.

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<sup>88</sup> Powell Hearings at 207.

<sup>89</sup> The speech is reprinted in Powell Hearings at 244-48.

<sup>90</sup> *Id.* at 247.

<sup>91</sup> *Id.*

<sup>92</sup> Lewis F. Powell, Jr., *Civil Liberties Repression: Fact or Fiction?—“Law-Abiding Citizens Have Nothing to Fear,”* *Richmond Times-Dispatch*, Aug. 1, 1971, reprinted in Powell Hearings at 213-17.

The question is often asked why, if prior court authorization to wiretap is required in ordinary criminal cases, it should not also be required in national security cases. In simplest terms the answer given by the government is the need for secrecy.

Foreign powers, notably the Communist ones, conduct massive espionage and subversive operations against America. They are now aided by leftist radical organizations and their sympathizers in this country. Court-authorized wiretapping requires a prior showing of probable cause and the ultimate disclosure of sources. Public disclosure of this sensitive information would seriously handicap our counter-espionage and counter-subversive operations.

....

The outcry against wiretapping is a tempest in a teapot. There are 210 million Americans. There are only a few hundred wiretaps annually, and these are directed against people who prey on their fellow citizens or who seek to subvert our democratic form of government. Law-abiding citizens have nothing to fear.<sup>93</sup>

A number of things stand out in this passage. First, and most obviously, Powell combined great trust in the government's actions in this area with a dismissiveness of civil libertarians' concerns as nothing but "a tempest in a teapot."<sup>94</sup> Second, he came very close to explicitly endorsing the government's secrecy argument—that imposing a warrant requirement would necessarily compromise the secrecy of the government's "counter-espionage and counter-subversive operations," which in turn would undermine the efficacy of those operations.<sup>95</sup>

Third, Powell became more pointed in his criticism of the foreign/domestic distinction. Noting that "some courts have distinguished [domestic threats] from foreign threats" and that "[t]he issue will be before the Supreme Court at the next term," Powell then proceeded to dismiss the distinction as "largely meaningless."<sup>96</sup> This was a direct reference to, and rejection of the reasoning of, the lower court decisions in *Keith*. The rejection was both descriptive and prescriptive. On the descriptive side, Powell observed that the most serious domestic threats to national security are in fact allied with and connected to hostile foreign entities, including "foreign Communist regimes."<sup>97</sup> Thus, a hard distinction between foreign and domestic threats simply did not fit reality. On the prescriptive side, by stressing that internal entities can be just as dangerous as external ones, he implied that aggressive government measures are just as appropriate against the former as against the latter. The "radical left" within the United States was "plotting violence and revolution," he maintained, and "[f]reedom can be lost as irrevocably from

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<sup>93</sup> *Id.* at 214-15.

<sup>94</sup> *Id.* at 215.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 214.

<sup>97</sup> *Id.* at 215.



revolution as from foreign attack.”<sup>98</sup> It was the government’s responsibility to guard against all such threats.<sup>99</sup>

When Powell came before the Senate Judiciary Committee for his confirmation hearings, members of the Committee pressed him on his views in this area. Senator Birch Bayh of Indiana led the questioning. Powell, however, revealed very little:

SEN. BAYH: . . . . Could you give us your thoughts relative to whether . . . it would not be a fair test to subject all wiretapping, to have the one who is going to use the wiretap to get a court order?

MR. POWELL: . . . . The ABA standards did incorporate provisions with respect to national security cases but did not require a prior court order. This involves action by a foreign power in espionage or comparable situations. The ABA standards did not address the far more troublesome area of internal security surveillance.

I have never studied that. I alluded to it in two of the talks which I sent to you. I understand that at least one case is either on the docket or on its way to the Court, and I doubt whether I should go beyond what I have said on that topic.

. . . .  
SEN. BAYH: Do you anticipate that the Court will have difficulty in trying to distinguish between domestic insurgents or domestic agents and international agents?

MR. POWELL: Senator, I wish you wouldn’t ask me that question. I don’t think I ought to speculate as to just what the Supreme Court might do, whether or not I am on it.

. . . .  
SEN. BAYH: . . . . But is it conceivable that you have already expressed such strong views in this area that you might be compelled to excuse yourself in a case that came before you on the subject matter?

MR. POWELL: I would reserve final judgment until I were confronted with the problem, but I would say without any hesitation as I think my Richmond Bar talk demonstrated, I have no fixed view on the delicate area that you have been discussing. . . .

SEN. BAYH: . . . . [reads aloud the passage of Powell’s article where he calls the foreign/domestic distinction “now largely meaningless” and refers to the “radical left . . . plotting violence and revolution”] Now, that may or may not be true. If they are, we have to deal with it. But first of all perhaps I should ask does . . . this article reflect your present views and aren’t those views rather strong in this area? Aren’t you rather

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<sup>98</sup> *Id.*

<sup>99</sup> For more on Powell’s op-ed, see Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1274-77 (2008).

specific in an area where you said you had not made up your mind already?

MR. POWELL: . . . . I think the language you read . . . was addressed primarily to this hazy area where internal security and national security, where internal dissidents are cooperating or working affirmatively with, or are very sympathetic to countries, other powers, that may be enemies of the United States. This is a very difficult area. Drawing that line, as I have said, is very perplexing.

But to come back to your question, I do not consider it was a fixed view considering the circumstances under which it was expressed, the brevity of expression—I was not writing a law review article. And yet I would add one other point, Senator, just to be absolutely clear: If I should go on the Court, and this Sixth Circuit case comes up after I come on the Court, I will be very conscious of the fact that I have written a few things, very few, really, in this area; and it may well be that I will disqualify myself. At the moment I would rather not say positively that I will or I won't.<sup>100</sup>

The Judiciary Committee ultimately gave the Powell nomination its unanimous support, and the full Senate confirmed it with a vote of 89 to 1.<sup>101</sup>

As the parties prepared to argue *Keith* before the Court, Powell's confirmation had to come as good news to the government and bad news to the defense. Although Powell insisted during the hearings that he did not have a "fixed view" when it came to the legality of warrantless wiretapping in the interests of internal security (or for that matter whether it was possible to distinguish between internal and external security in that context),<sup>102</sup> he must have looked like a good bet for the government. Indeed, when Powell arrived at the Court, the defendants could reasonably have believed that their best hope with him was recusal.

### *Counsel and Arguments Before the Court*

Oral argument took place on February 24, 1972, before an eight-member Court. Justice Powell did not recuse; Justice Rehnquist did.<sup>103</sup>

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<sup>100</sup> Powell Hearings at 207-13.

<sup>101</sup> Senator Bayh was among the "yeas." The lone "nay" was Senator Fred Harris of Oklahoma. See 117 Cong. Rec. 44,857 (1971); Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* 15 (4th ed. 1999).

<sup>102</sup> Powell Hearings at 211.

<sup>103</sup> Justice Rehnquist offered no public reason for his recusal at the time. But in a later opinion explaining his decision not to recuse in a different case, he noted that while serving in the Justice Department's Office of Legal Counsel before joining the Court, he had "assisted in drafting" one of the government's briefs in the *Keith* litigation, and he cited that as the reason for his recusal. *Laird v. Tatum*, 409 U.S. 824, 828-29 (1972) (Rehnquist, J., on motion to recuse).

Arthur Kinoy, a professor at Rutgers University School of Law and co-founder of the Center for Constitutional Rights, argued on behalf of the defense.<sup>104</sup> Kuntsler, Weinglass, and Davis remained on the brief.<sup>105</sup> As the named target of the mandamus petition, Judge Keith had his own counsel before the Court. William T. Gossett, formerly the President of the American Bar Association, argued on his behalf. With him on the brief was Abraham Sofaer, then a professor at Columbia Law School and later himself a federal district judge.

Ordinarily, the government’s argument would have been presented by someone in the Solicitor General’s Office.<sup>106</sup> The Solicitor General at the time was Erwin Griswold, former Dean of the Harvard Law School and a familiar and powerful presence before the Court.<sup>107</sup> Yet while his name was on the government’s brief,<sup>108</sup> neither he nor any other member of his office argued the case. This did not go unnoticed. The *New York Times* attributed Griswold’s absence to his own disagreement with the government’s use of warrantless surveillance,<sup>109</sup> and there is reason to think the *Times* was right. Decades later, Judge Keith recalled a conversation with Griswold during Thurgood Marshall’s 80th birthday party, in which Griswold told Keith: “Judge, the reason I didn’t want to argue that case was that I didn’t believe that the government had this type of authority. . . . I thought you were absolutely right.”<sup>110</sup>

Instead, Robert C. Mardian, Assistant Solicitor General in charge of the Justice Department’s Internal Security Division, argued on behalf of the government.<sup>111</sup> Mardian was a controversial figure. As head of the Internal Security Division—an office originally established during the McCarthy era but largely inactive for many years until the Nixon administration revived it—he presided over hundreds of investigations and

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<sup>104</sup> See 72 Landmark Briefs at 1035; Fred P. Graham, *High Court Curbs U.S. Wiretapping Aimed at Radicals*, N.Y. Times, June 20, 1972, at 23.

<sup>105</sup> See 72 Landmark Briefs at 723.

<sup>106</sup> There were and continue to be exceptions to that practice, but it was and remains the general rule.

<sup>107</sup> President Johnson first appointed Griswold Solicitor General in 1967. He retained the office under President Nixon, serving until 1973. By then he had occupied the office longer than anyone since John Davis, who served from 1913 to 1918.

<sup>108</sup> See 72 Landmark Briefs at 569.

<sup>109</sup> See Graham, *supra* note 2, at 23 (stating that the wiretapping program overseen by Attorney General Mitchell was “so controversial among career attorneys that when the case reached the Supreme Court no member of the Solicitor General’s office argued the government’s case”).

<sup>110</sup> Keith Remarks at 385 (quoting Griswold); see also Davis Remarks at 372 (stating that “Erwin Griswold . . . found the government’s position to be so unpalatable, that he declined to argue the case for the United States”).

<sup>111</sup> See 72 Landmark Briefs at 1035; Fred P. Graham, *High Court Curbs U.S. Wiretapping Aimed at Radicals*, N.Y. Times, June 20, 1972, at 23.

grand jury proceedings (but few actual convictions) targeting elements of the “New Left.”<sup>112</sup>

A close political ally of President Nixon and former Attorney General Mitchell (who by then had left the Justice Department to manage Nixon’s re-election campaign), Mardian, along with Mitchell and White House Chief of Staff H.R. Haldeman, would later be convicted of conspiracy to hinder the investigation into the break-in at the Washington, DC headquarters of the Democratic National Committee—that is, the Watergate break-in.<sup>113</sup> That break-in turned out to have been the work of people associated with the Committee to Re-elect the President, which Mitchell ran. Indeed, Mitchell was among the principal players in the attempted cover-up of the break-in, which, as is well known, ultimately led to President Nixon’s resignation. Moreover, investigations conducted by Senate and House Committees revealed that the Watergate break-in was just one of many illegal activities authorized and carried out by Nixon’s staff. Others included campaign fraud, other illegal break-ins, and warrantless wiretapping on a massive scale, including of the press and regular citizens.<sup>114</sup> Seen with the benefit of hindsight, the fact that the government’s position in *Keith* turned on the assertions contained in an affidavit by Mitchell is more than a little ironic. Along with Haldeman, Mitchell himself had “ordered warrantless wiretaps to be placed on the telephones of newsmen and certain employees of the executive branch.”<sup>115</sup> A clearer case of the fox guarding the henhouse is hard to imagine.

Things were not so clear when *Keith* was argued, however. To be sure, civil libertarians already suspected that the administration was engaged in widespread surveillance of its political enemies. During Kinoy’s presentation to the Court, for example, he asserted that Mitchell had authorized warrantless wiretapping of “leaders of the anti-war movement, black movements, Catholic activist pacifists, advocates of youth culture.”<sup>116</sup> But the Watergate scandal was months away<sup>117</sup> and the various congressional

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<sup>112</sup> See Judith Berkan, *The Federal Grand Jury: An Introduction to the Institution, Its Historical Role, Its Current Use and the Problems Faced by the Target Witness*, 17 Rev. Juridica U. Inter. P.R. 103, 109 (1983) (“In the three-year period from 1970 to 1973, the [Internal Security Division] conducted over 100 investigations, principally directed at ‘New Left’ groups in the United States. Between 1000 and 2000 witnesses were called before Grand Juries, and 200 indictments resulted. Of those cases in which indictments were issued, only 10% resulted in convictions, a very low rate when compared to the average 65.2% conviction rate in ordinary cases.”).

<sup>113</sup> The D.C. Circuit subsequently reversed Mardian’s conviction on procedural grounds, and the special prosecutor declined to re-try him. See *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976); see also *United States v. Haldeman*, 559 F.2d 31, 51-59 (D.C. Cir. 1976) (per curiam).

<sup>114</sup> See *Final Report of the Senate Select Comm. To Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, pt. 2, at 169 (1976).

<sup>115</sup> Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 Duke L.J. 1, 20-21.

<sup>116</sup> 72 Landmark Briefs at 1063.

<sup>117</sup> The break-in took place on June 17, 1972, four months after *Keith* was argued and, coincidentally, just two days before the Court announced its decision. But it was not until much later that

investigations still years off, so claims of this sort did not yet have the credibility they would gain later on.<sup>118</sup> Thus, to understand the story of *Keith* as it actually unfolded, it is important to bear in mind that although many of the key players in the case were also central figures in the Watergate scandal, the two did not coincide in time.

Even without the taint of Watergate, however, Mardian faced a skeptical Court. Much of his opening argument was spent addressing questions from Justice White<sup>119</sup> about the application of Title III of the 1968 Act, and about whether the Attorney General's affidavit complied with the statutory limitations established by the Act. Other members of the Court seemed impatient with the statutory issue, however. Another Justice finally complained that Mardian "ke[pt] ducking the Fourth Amendment," and urged him to turn to it.<sup>120</sup>

Mardian obliged. He did so against the backdrop of briefing by the government that had advanced a more modest position on the Fourth Amendment issue than the one it had pressed in the lower courts. As the Sixth Circuit put it, the government at that stage had argued that "the President of the United States, in his capacity as Chief Executive, has unique powers of the 'sovereign' which serve to exempt him and his agents from the judicial review restrictions of the Fourth Amendment."<sup>121</sup> The President's inherent power to act in the interests of national security, in other words, rendered the Fourth Amendment simply inapplicable. Before the Supreme Court, the government's briefs were more restrained. Rather than seeking a categorical exemption from the Fourth Amendment, the government argued that the Fourth Amendment's only requirement was that searches not be "unreasonable," and that a decision by the President (or the Attorney General on his behalf) to authorize electronic surveillance in the interests of national security "is not unreasonable solely because it is conducted without prior judicial approval."<sup>122</sup> The government thus conceded that the reasonableness constraint applied

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the involvement of the White House and others in the Nixon administration came to light. For more on the Watergate break-in and the indictments that ensued, see chapter 9 in this volume.

<sup>118</sup> Moreover, Kinoy himself did not seem to carry much weight with the Court. Justice Blackmun was certainly not impressed with his argument. Although he went in to the argument tentatively inclined to affirm the Sixth Circuit, Justice Blackmun wrote in his notes that Kinoy "alm[ost] los[t] t[he] case for me." Harry Blackmun Papers, Library of Congress, box 141, folder 10. He described Kinoy as "very dramatic," "preaching," "loud," and "a tense guy." *Id.* The Court as a whole asked Kinoy literally no questions during his argument, a likely sign that the Justices saw little to be gained from dialog with him. *See generally* 72 Landmark Briefs at 1061-70.

<sup>119</sup> The oral argument transcripts produced at the time do not identify which Justice is speaking, but it seems fair to infer that Justice White led the questioning on this point. First, at one point in his discussion of the statute, Mardian referred to Justice White by name in a way that suggests he had been the questioner. *See* 72 Landmark Briefs at 1042. Second, as noted below, the statutory issue ultimately formed the basis for Justice White's separate concurrence in the case. *Keith*, 407 U.S. 297, 335 (1972) (White, J., concurring in the judgment).

<sup>120</sup> 72 Landmark Briefs at 1051.

<sup>121</sup> *United States v. United States District Court*, 444 F.2d 651, 657 (6th Cir. 1971).

<sup>122</sup> Brief for the United States at 6, *Keith*, 407 U.S. 297 (No. 70-153), *reprinted in* 72 Landmark Briefs at 583 (No. 1687).

to presidentially ordered surveillance. It requested only that warrantless surveillance of this sort not be deemed categorically unreasonable for lack of a warrant.<sup>123</sup>

Mardian tried to maintain that position during oral argument, but it unraveled. On one hand, he continued to stress that the government was “not asking for an exemption from the Fourth Amendment.”<sup>124</sup> Yet on the other, his account of what the government *was* seeking sounded very much like an exemption: “We simply suggest that in the area in which he has limited but exclusive authority, the President of the United States may authorize electronic surveillance; *and, in those cases, it is legal.*”<sup>125</sup> This was precisely what the government’s brief had disclaimed: an argument that the President’s (or Attorney General’s) authorization itself rendered the surveillance lawful. Recognizing this point, a member of the Court asked Mardian whether, under the theory he was articulating, it was “possible [for] . . . the President [to] make an unreasonable intrusion into the private life of a citizen of this country.”<sup>126</sup> Once “the President decides it’s necessary to bug John Doe’s phone,” was there truly “nothing under the sun John Doe can do about it?”<sup>127</sup> Mardian seemed to say that John Doe indeed had no judicial recourse, and suggested that relying at that point on the President’s own duty of fidelity to the Constitution “is an attribute of our Government which exists and has always existed.”<sup>128</sup> Thus did Mardian’s opening argument undermine the modesty of the government’s briefs.

Things did not get much better for the government when Mardian rose for rebuttal. A member of the Court pressed him on the point that, in contrast to the system of judicial warrants envisioned by the Fourth Amendment, the government’s position provided for no adversarial testing of the asserted basis for a wiretap.<sup>129</sup> Mardian responded by saying that Gossett, as Judge Keith’s attorney in the proceedings before the Sixth Circuit and the Supreme Court, was entitled to review the logs and other material that the government had originally submitted to Judge Keith for his *in camera* review.<sup>130</sup> He did not explain how such *ex post* review in the context of a *mandamus* proceeding could be an adequate substitute for the *ex ante* review entailed in the Fourth

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<sup>123</sup> *Id.* at 10, *reprinted in* 72 Landmark Briefs at 587 (“The government makes no claim that . . . authorization by the Attorney General itself establishes compliance with the Fourth Amendment standard of reasonableness; it urges the Court only to hold that the absence of prior judicial approval does not invalidate the search under that standard.”).

<sup>124</sup> 72 Landmark Briefs at 1051.

<sup>125</sup> *Id.* (emphasis added).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* Mardian’s answer brings to mind President Nixon’s now-infamous statement some years later that “[w]hen the President does it, that means that it is not illegal.” *Nixon: A President May Violate the Law*, U.S. News & World Rep., May 30, 1977 at 65 (reporting on a May 19, 1977 interview with David Frost).

<sup>129</sup> *See* 72 Landmark Briefs at 1071.

<sup>130</sup> *Id.* at 1071-72.

Amendment’s warrant procedure. But in any event, Gossett himself evidently did not understand that he had the right of review Mardian claimed he had, and under questioning Mardian acknowledged that no one in the government had ever told Gossett that he could see the materials.<sup>131</sup> Mardian insisted, however, that “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 demand.”<sup>132</sup> What, then, of Plamondon, the person actually facing criminal charges? “Can his lawyer see it?” the Court asked. Mardian said no.<sup>133</sup> He was not pressed further on the point. But according to defense counsel Davis, “Thurgood Marshall, who . . . had argued [*Brown v. Board of Education*] with Kinoy in the Supreme Court, turned his chair around and never again looked at the government’s lawyer [Mardian] during the entire argument. It was a stunning and telling moment.”<sup>134</sup>

That moment came quite near the end of the argument, and by the time it was over Mardian would have found in the Justices’ reactions relatively little reason for optimism.

### *Deliberations*

In their post-argument conference, all eight Justice voted to affirm—that is, to uphold Judge Keith’s disclosure order.<sup>135</sup> But there was substantial disagreement on the grounds. Five members of the Court—Douglas, Brennan, Stewart, Marshall, and Powell—voted to affirm “on the Constitution,”<sup>136</sup> which meant agreeing with Judge Keith and the Sixth Circuit that the surveillance in question violated the Fourth Amendment. The other three—Burger, White, and Blackmun—voted to affirm “on the statute,”<sup>137</sup> which meant concluding that the Attorney General’s affidavit did not establish that the wiretapping at issue fell within the bounds of the “national security disclaimer” in Title III of the 1968 Act.<sup>138</sup> A holding of that sort would have the virtue of avoiding a direct constitutional confrontation with the executive branch.<sup>139</sup> But it would also leave entirely

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<sup>131</sup> See *id.* at 1072.

<sup>132</sup> *Id.* at 1076.

<sup>133</sup> *Id.* at 1072.

<sup>134</sup> Davis Remarks at 372.

<sup>135</sup> See Letter from Justice Douglas to Chief Justice Burger (Mar. 6, 1972), in Harry Blackmun Papers, Library of Congress, box 136, folder 2 [hereinafter “Douglas Letter”] (describing the initial vote as unanimously to affirm, though on different grounds).

<sup>136</sup> *Id.*

<sup>137</sup> Douglas’s letter to Burger does not mention Blackmun by name, but instead says that Justice White “and two others including yourself voted to affirm on the statute.” *Id.* Because Douglas expressly lists himself, Brennan, Stewart, Marshall, and Powell as affirming on the Constitution, the other vote for the statutory basis has to have been Blackmun.

<sup>138</sup> See 18 U.S.C. § 2511(3).

<sup>139</sup> See generally *Ashwander v. TVA*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring) (discussing virtues of avoiding constitutional issues where possible, and cataloging methods of such avoidance).

unresolved an issue of increasing national significance, namely the extent of the President's authority to order warrantless surveillance in the interests of national security. A statutory holding would simply tell future Attorneys General that their affidavits must more closely track the language in Title III's disclaimer provision. It would amount to little more than a lesson in affidavit drafting.

Burger initially assigned the opinion to White, who was firmly in favor of affirming on the statute. Douglas objected, pointing out that the statutory ground had only three votes while the constitutional ground had five.<sup>140</sup> He proposed that the Chief give Powell the assignment instead.<sup>141</sup> Alternatively, Douglas said he could make the assignment himself.<sup>142</sup> This was a canny move by Douglas, the senior liberal on the Court. Undoubtedly pleased and perhaps even surprised (given his past statements on the issue) that Powell appeared willing to affirm on constitutional grounds, Douglas may have suggested assigning the opinion to Powell in order to help "lock in" his vote. It would also ensure that this new Nixon appointee took a strong stand against the President that had appointed him, something Douglas surely would have enjoyed. At the same time, the veiled threat that Douglas himself might take over the assignment prerogative raised the possibility that he might keep it for himself or give it to someone like Brennan, thus raising the possibility of an extremely aggressive constitutional opinion that might still command a majority. As between that and allowing Powell to write, the typically conservative, more government-friendly Burger should have preferred the latter.

Burger went part way there. In a letter responding to Douglas, he said that both Powell and White should go ahead and write their opinions.<sup>143</sup> He suggested that he thought White might have "substantial" support for his statutory holding, and that he was not sure Powell and White were truly that far apart in their approaches.<sup>144</sup> Thus, he said, it made sense for both to proceed with their opinions and see what resulted.<sup>145</sup>

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<sup>140</sup> See Douglas Letter.

<sup>141</sup> *Id.* ("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?").

<sup>142</sup> *Id.* ("Or if you want me to suggest an assignment, that would be fine.")

<sup>143</sup> Letter from Chief Justice Burger to Justice Douglas (Mar. 6, 1972), in Harry Blackmun Papers, Library of Congress, box 136, folder 2 [hereinafter "Burger Letter"].

<sup>144</sup> *Id.* ("[T]here may be much likelihood of Byron's securing substantial support and I am not sure Byron's and Lewis' views are not rather close.")

<sup>145</sup> The account in the text is based upon copies of the actual correspondence among the Justices, found in the Blackmun Papers. It differs from the account offered by Bob Woodward and Scott Armstrong in their 1979 book, *The Brethren*. According to Woodward and Armstrong, "White rejected the assignment [of the majority opinion], noting that he and the Chief were alone in their view. Douglas immediately reassigned the case to Powell . . ." Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 264 (1979). In fact, however, the correspondence in the Blackmun Papers shows that there was no formally reassignment, only a suggestion of such by Douglas and an agreement by Burger that both White and Powell ought to press forward with their respective drafts.



Burger did not explain why he thought Powell’s and White’s positions might actually be similar, and in fact they were not. When White circulated his draft on March 14, it relied exclusively on the Mitchell affidavit’s failure to track the language of Title III’s national security exception.<sup>146</sup> A memorandum to Justice Blackmun from one of his law clerks also suggested that the draft may have been written and circulated “in a hurry to stake out Justice White’s position,” and that it had “the feeling of an off-the-cuff, unedited opinion: sparsely documented, and pregnant with potentially suggestive language when it touches the merits.”<sup>147</sup> Although Justice Blackmun originally voted to affirm on the statutory ground, his clerk urged him not to join White’s opinion.<sup>148</sup> Blackmun waited, as did everyone else: White’s opinion attracted no votes.

Powell circulated his opinion in early May. Douglas, Marshall, and Stewart joined the opinion immediately, apparently without requesting any changes.<sup>149</sup> Blackmun waited several weeks before finally joining on June 12.<sup>150</sup> By then, Powell’s opinion commanded a clear majority. When the decision was issued the following week, everyone but Burger and White had joined the Powell opinion. Douglas also wrote a separate concurrence excoriating the government for its abusive intrusions on personal privacy and characterizing its appeals to national security as the symptoms of “another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era.”<sup>151</sup> White concurred only in the judgment, adhering to his position that the case should be resolved on statutory grounds.<sup>152</sup> And Burger, inexplicably, concurred in the result without writing or joining any opinion at all.<sup>153</sup>

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<sup>146</sup> See Memorandum from GTF to Justice Blackmun (Mar. 14, 1972), in Harry Blackmun Papers, Library of Congress, box 136, folder 2 [hereinafter “GTF Memo I”] (describing White’s draft). “GTF” are the initials of Justice Blackmun’s law clerk working on the case. They stand for George T. Frampton, Jr., who later went served as a Watergate special prosecutor and, much later, as Deputy Secretary of the Interior under President Clinton.

<sup>147</sup> *Id.*

<sup>148</sup> See GTF Memo I.

<sup>149</sup> See join letters collected in Harry Blackmun Papers, Library of Congress, box 136, folder 2. Douglas did say that he “may possibly file a separate opinion, not in derogation of what [Powell had] written, but in further support of it.” *Id.* He ultimately did so, although he also joined the Powell opinion in full. See *Keith*, 407 U.S. 297, 324 (1972) (Douglas, J., concurring). The Blackmun Papers do not contain anything indicating the date or terms of Brennan’s join. But there is no evidence that he pressed for any changes in Powell’s draft, and it seems reasonable to infer that he joined the opinion at around the same time as Stewart, Marshall, and Douglas.

<sup>150</sup> See join letter (June 12, 1972), in Harry Blackmun Papers, Library of Congress, box 136, folder 2.

<sup>151</sup> *Keith*, 407 U.S. at 324, 329 (Douglas, J., concurring).

<sup>152</sup> *Id.* at 335 (White, J., concurring in the judgment).

<sup>153</sup> *Id.* at 324.

### *The Court's Opinion*

Powell's opinion for the Court stressed that while the question before the Court was an important one, it was also narrow. That question, the Court explained, was the one left open in *Katz*: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security."<sup>154</sup> To address the question, the Court began by acknowledging that the President may well "find it necessary [in certain circumstances] to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government."<sup>155</sup> Indeed, the use of such surveillance could well be a critical means of "safeguard[ing] [the government's] capacity to function and to preserve the security of its people."<sup>156</sup> In this respect, the Court conceded that the President—and, implicitly, his designee the Attorney General—had the basic constitutional authority to order electronic surveillance in the interests of national security.

But to acknowledge a constitutional authority is not to say it is without limit. The Court stressed in particular that the interests of national security do not eliminate the constitutional concerns surrounding warrantless surveillance. To the contrary, national security cases "often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime."<sup>157</sup> This connection between the First and Fourth Amendment is an important theme in the opinion. As the Court put it:

History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect 'domestic security.'<sup>158</sup>

To those who remembered Powell's op-ed in the *Richmond Times-Dispatch* the previous summer, this passage must have been striking. Where earlier he had painted the domestic targets of electronic surveillance as leaders of a "radical left . . . plotting violence and revolution,"<sup>159</sup> now he saw them as dissident voices vulnerable to government repression on account of their "unorthodo[x] . . . political beliefs."<sup>160</sup>

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<sup>154</sup> *Id.* at 309 (quoting *Katz v. United States*, 389 U.S. 347, 358 n.23 (1967)).

<sup>155</sup> *Id.* at 310.

<sup>156</sup> *Id.* at 312.

<sup>157</sup> *Id.* at 313.

<sup>158</sup> *Id.* at 314.

<sup>159</sup> Lewis F. Powell, Jr., *Civil Liberties Repression: Fact or Fiction?—“Law-Abiding Citizens Have Nothing to Fear,”* *Richmond Times-Dispatch*, Aug. 1, 1971, *reprinted in* Powell Hearings at 215.

<sup>160</sup> *Keith*, 407 U.S. at 314. Of course, neither description purported to apply to all possible cases, but the shift is significant nonetheless.

The link between the First and Fourth Amendment values helped support the next key move in the opinion: the conclusion that constitutional values “cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch.”<sup>161</sup> Such an arrangement, the Court said, is at odds with the institutional roles contemplated by the Fourth Amendment. The job of the executive is “to enforce the laws, to investigate, and to prosecute” while the duty of the judiciary is to constrain the executive in its quest for enhanced power.<sup>162</sup> Whether or not the executive might in fact be capable of checking itself in some cases, that it not a risk that the Fourth Amendment tolerates.<sup>163</sup> Thus, although the Court “recognize[d] . . . the constitutional basis of the President’s domestic security role,” it held that the role “must be exercised in a manner compatible with the Fourth Amendment.”<sup>164</sup> Here, that meant complying with “an appropriate prior warrant procedure.”<sup>165</sup>

Having announced its core holding, the Court then addressed and rejected a number of the government’s arguments. Here again, Powell seemed to turn 180 degrees from his position in the *Times-Dispatch* article. Whereas earlier he expressed sympathy with the government’s worry that a judicial warrant procedure would destroy the secrecy of its national security efforts,<sup>166</sup> on behalf of the Court he rejected that very concern: “The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases.”<sup>167</sup> The Court likewise rejected the government’s related argument that “internal security matters are too subtle and complex for judicial evaluation.”<sup>168</sup> In a passage that is difficult to read as anything other than a statement of professional pride, the Court insisted that judges “regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.”<sup>169</sup> And besides, the Court said with near indignation, if the Attorney General and other senior law enforcement officers are incapable of communicating the significance of a particular threat to a court, perhaps the threat is not so significant after all.<sup>170</sup>

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<sup>161</sup> *Id.* at 316-17.

<sup>162</sup> *Id.* at 317.

<sup>163</sup> *Id.* (“The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised.” (footnote omitted)).

<sup>164</sup> *Id.* at 320.

<sup>165</sup> *Id.*

<sup>166</sup> See Lewis F. Powell, Jr., *Civil Liberties Repression: Fact or Fiction?—“Law-Abiding Citizens Have Nothing to Fear,”* Richmond Times-Dispatch, Aug. 1, 1971, reprinted in Powell Hearings at 215.

<sup>167</sup> *Keith*, 407 U.S. at 320-21.

<sup>168</sup> *Id.* at 320.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* (“If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.”).

The Court concluded by reemphasizing the narrowness of its holding. There are two key points here. First, the Court left open the possibility that Congress could establish legislative standards for the use of electronic surveillance in national security cases that departed from the standards applicable in criminal cases under Title III of the 1968 Act.<sup>171</sup> In that sense, the Court stressed that the precise contours of the warrant requirement it was upholding were subject to legislative specification.<sup>172</sup> The Court even identified a number of procedures Congress might want to adopt—including, for example, designating a special court in Washington, D.C. as responsible for evaluating warrant applications in national security cases.<sup>173</sup>

Second, adopting the same basic distinction observed by Judge Keith and the Sixth Circuit, the Court stressed that the instant case “involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents.”<sup>174</sup> The Court dropped a footnote at that point, citing two lower court cases, as well as the ABA Committee whose standards Powell had earlier worked on, as examples of authorities embracing “the view that warrantless surveillance, though impermissible in domestic security cases, may be constitutional where foreign powers are involved.”<sup>175</sup> An earlier draft of the opinion contained a more detailed list of authorities on that point, suggesting more strongly that foreign surveillance cases would come out the other way.<sup>176</sup> The modification of the footnote suggests that at least some on the Court truly did not want to suggest anything one way or the other about cases involving foreign targets.

The Court’s embrace of the domestic/foreign distinction arguably marks another important difference between it and Powell’s earlier statements. The precise distinction that Powell had once derided as “largely meaningless” emerged by the end of *Keith* as potentially decisive for Fourth Amendment purposes. How should we read this shift? One possibility is simply that Powell changed his mind. After immersing himself in the *Keith* materials, he may have become convinced that a distinction he earlier deemed empty can sometimes have coherent meaning.

Another possibility, however, is that Powell embraced the distinction *precisely because* he thought it meaningless in most cases. The Mitchell affidavit in *Keith* was

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<sup>171</sup> *Id.* at 322-24.

<sup>172</sup> *Id.* at 324 (explaining that although the Court held that “prior judicial approval is required for the type of domestic surveillance involved in this case,” it also allowed that “such approval may be made in accordance with such reasonable standards as the Congress may prescribe”).

<sup>173</sup> *Id.* at 323.

<sup>174</sup> *Id.* at 321-22.

<sup>175</sup> *Id.* at 322 n.20 (citations omitted).

<sup>176</sup> See Memorandum from GTF to Justice Blackmun (May 18, 1972), in Harry Blackmun Papers, Library of Congress, box 136, folder 2 (describing the earlier version of footnote 20 as “strongly suggest[ing] that the foreign intelligence or espionage situation would go the other way.”).

striking in its exclusive focus on domestic threats.<sup>177</sup> At the time it was drafted, the government had no particular incentive to characterize the threats any other way, since the domestic/foreign distinction did not yet have the legal salience that *Keith* would give it. But if Powell was right in his *Times-Dispatch* op-ed that domestic and foreign threats are so frequently interconnected that the domestic/foreign distinction is essentially irrelevant in many cases, then embracing that very distinction was a way to minimize the impact of the *Keith* decision. If a significant portion of serious domestic threats can readily be described as involving foreign entities as well, then the constitutional holding in *Keith* is vanishingly small. Indeed, one might even say that the Court's holding, like Justice White's statutory concurrence, amounts to little more than a lesson in affidavit drafting: to bypass *Keith*, the government need only highlight the connections between the domestic and foreign elements of the target.

However one reads *Keith*'s treatment of the domestic/foreign distinction, that and other aspects of the Court's opinion had enormous impact on the law of national security surveillance in the years that followed. The next section addresses that impact.

### *Keith's Impact*

The effect of the *Keith* decision might be best appreciated by distinguishing among at least three different effects: the reactions it provoked in the press; its direct doctrinal effect on warrantless surveillance cases in the years immediately following; and its connection to executive and legislative efforts to regulate intelligence-related surveillance, especially the enactment in 1978 of the Foreign Intelligence Surveillance Act. This section considers each effect in turn.

#### *The Press Reaction*

The *Keith* decision created headlines as soon as it was issued.<sup>178</sup> Echoing the sentiments of many in the press, a *New York Times* editorial hailed it as “a sharp rebuke to those ideologues of the executive branch who consider the President’s ‘inherent powers’ superior to the Constitution.”<sup>179</sup> Depicted in these terms, the decision hardly seemed narrow or confined. It was, rather, a sweeping reaffirmation of “the historic lesson that a blank check of official powers is the prelude to their abuse.”<sup>180</sup> The Court was lauded for having “ignor[ed] the usual division between ‘liberal’ and ‘conservative’” to “remin[d] the Government that it is just because its powers are so awesome that their exercise cannot be left to the discretion of men without precise restraint of law, under the

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<sup>177</sup> See *Keith*, 407 U.S. at 300 n.2 (referring to “attempts of domestic organizations to attack and subvert the existing structure of the Government”).

<sup>178</sup> See, e.g., Fred P. Graham, *High Court Curbs U.S. Wiretapping Aimed at Radicals*, N.Y. Times, June 20, 1972, at A1; Glen Elsasser, *Court Rules Wiretaps Need OK*, Chi. Trib., June 20, 1972, at 1A; John P. MacKenzie, *Court Curbs Wiretapping of Radicals*, Wash. Post, June 20, 1972, at A1.

<sup>179</sup> Editorial, *The Restraint of Law*, N.Y. Times, June 20, 1972, at 38.

<sup>180</sup> *Id.*

Constitution.”<sup>181</sup> *Keith*, then, was received as nothing less than a triumph of the rule of law itself.

### *Direct Doctrinal Impact*

*Keith*'s direct doctrinal impact was less sweeping. This was due in large part to the Court's embrace of the domestic/foreign distinction and its insistence that its holding applied only to purely domestic cases. Warrantless surveillance of foreign targets thus remained an open question after *Keith*. Lower courts soon took it up. The year after *Keith* was decided, the Fifth Circuit upheld the legality of surveillance in which an American citizen was incidentally overheard on a warrantless wiretap that had been set up for foreign intelligence purposes.<sup>182</sup> Addressing the precise question reserved in *Keith*, the court held that “the President's constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign affairs” empower him to “authorize warrantless wiretaps for the purpose of gathering foreign intelligence.”<sup>183</sup> The Third Circuit reached a similar result the following year after determining that the primary purpose of the warrantless surveillance in question was to obtain foreign intelligence.<sup>184</sup> And in 1977, the Ninth Circuit stated confidently that “[f]oreign security wiretaps are a recognized exception to the general warrant requirement.”<sup>185</sup>

The lower courts were not unanimous on this point, however. In a case involving surveillance of a purely domestic organization, the D.C. Circuit questioned in dicta whether any national security exception to the warrant requirement could pass constitutional muster, foreign target or not.<sup>186</sup> But that was a minority position. After *Keith*, most lower courts were prepared to conclude that “in foreign-related matters of national security the Government is indeed excused from its normal obligation to obtain a warrant.”<sup>187</sup>

This tendency to recognize a “foreign surveillance exception” put pressure on the domestic/foreign distinction itself, the very distinction Powell had once derided as

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<sup>181</sup> *Id.*

<sup>182</sup> *See* *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974).

<sup>183</sup> *Id.* at 426.

<sup>184</sup> *See* *United States v. Butenko*, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied sub nom. Ivanov v. United States*, 419 U.S. 881 (1974).

<sup>185</sup> *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977).

<sup>186</sup> *See* *Zweiborn v. Mitchell*, 516 F.2d 594, 613-14 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 944 (1976) (“[A]n analysis of the policies implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional . . . .” (footnote omitted)).

<sup>187</sup> Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 Harv. L. Rev. 976, 977 (1974); *see also id.* at 977 n.8 (collecting cases).

“largely meaningless.”<sup>188</sup> The problem was definitional. What, precisely, are the boundaries of foreign security surveillance? As a 1974 Note in the *Harvard Law Review* put it, “[a]lmost any problem of governmental concern could be said to relate, at least remotely, to the national security, and to bear, at least potentially, on the country’s relations with foreign powers. If loosely drawn, a foreign security exception to the warrant requirement could thus be very broad.”<sup>189</sup> And of course, *Keith* itself said nothing about how loosely or tightly any such exception should be drawn.

### *Longer Term Executive and Legislative Responses*

Foreign security surveillance did not remain entirely unregulated, however. Not long after the *Keith* decision, the executive branch developed its own standards governing foreign intelligence surveillance. Under those standards, warrantless electronic surveillance was to be employed only in cases where the targets were foreign powers or their agents, and where the purpose of the surveillance was to obtain foreign intelligence information. The executive’s standards also limited the uses to which the fruits of such surveillance could be put.<sup>190</sup>

Such executive self-policing did not satisfy Congress. Spurred by the Watergate scandal, congressional investigations in the mid-1970s uncovered evidence of a broad range of abuses of government authority, especially in the area of purported national security intelligence gathering. The 1976 conclusions of the Church Committee are representative:

Virtually every element of our society has been subjected to excessive government-ordered intelligence inquiries. Opposition to government policy or the expression of controversial views was frequently considered sufficient for collecting data on Americans. The committee finds that this extreme breadth of intelligence activity is inconsistent with the principles of our Constitution which protect the rights of speech, political activity, and privacy against unjustified governmental intrusion.<sup>191</sup>

More specifically, the Church Committee found that warrantless surveillance had been used against numerous U.S. citizens having no discernible connection to any foreign

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<sup>188</sup> Lewis F. Powell, Jr., *Civil Liberties Repression: Fact or Fiction?—“Law-Abiding Citizens Have Nothing to Fear,”* Richmond Times-Dispatch, Aug. 1, 1971, reprinted in Powell Hearings at 214.

<sup>189</sup> Note, *Foreign Security Surveillance and the Fourth Amendment*, 87 Harv. L. Rev. 976, 977 (1974).

<sup>190</sup> See *Electronic Surveillance Within the United States for Foreign Intelligence Purpose: Hearings on S. 3197 Before the Subcomm. on Intelligence and the Rights of Americans of the S. Select Comm. on Intelligence*, 94th Cong. 77 (1976) (statement of Attorney General Levi).

<sup>191</sup> *Final Report of the Senate Select Comm. To Study Governmental Operations with Respect to Intelligence Activities and the Rights of Americans*, S. Rep. No. 94-755, pt. 2, at 169 (1976).

power and posing no credible threat to national security.<sup>192</sup> It traced those abuses in part to the lack of clear standards governing foreign intelligence surveillance.<sup>193</sup>

In 1978, Congress responded by passing the Foreign Intelligence Surveillance Act (FISA).<sup>194</sup> As the Senate Judiciary Committee explained in a statement outlining the need for the legislation, “This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused.”<sup>195</sup> Congress sought to “‘curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it,’ while [still] permitting the legitimate use of electronic surveillance to obtain foreign intelligence information.”<sup>196</sup>

FISA is sometimes viewed as a response to the Supreme Court’s suggestion in *Keith* that Congress adopt special standards for surveillance in national security cases.<sup>197</sup> Yet, while *Keith* and FISA are certainly connected in important respects,<sup>198</sup> FISA does not take up the precise invitation issued in *Keith*. That invitation applied to the category of surveillance addressed in the case—so-called “domestic security” surveillance for intelligence purposes.<sup>199</sup> FISA does not cover such surveillance. In fact, “[n]o congressional action has ever been taken regarding the use of electronic surveillance in the domestic security area.”<sup>200</sup> For cases falling in that area, therefore, *Keith*’s direct application of the Fourth Amendment continues to govern.

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<sup>192</sup> *Id.* at 5.

<sup>193</sup> *Id.* at 186-87.

<sup>194</sup> Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801 *et seq.*).

<sup>195</sup> S. Rep. No. 95-604(I) at 8 (1977), 1978 U.S.C.C.A.N. 3904, 3909.

<sup>196</sup> Elizabeth B. Bezan & Jennifer K. Elsea, Memorandum, Cong. Research Serv., *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information* 13 (Jan. 5, 2006), available at <http://www.fas.org/sgp/crs/intel/m010506.pdf> (quoting *id.*).

<sup>197</sup> See, e.g., Robert Bloom & William J. Dunn, *The Constitutional Infirmary of Warrantless NSA Surveillance: The Abuse of Presidential Power and the Injury to the Fourth Amendment*, 15 Wm. & Mary Bill Rts. J. 147, 159 (2006) (“Congress would accept [*Keith*’s] invitation to provide a separate but integrated protective scheme for electronic surveillance driven by national security interests with the passage of FISA.”).

<sup>198</sup> See generally Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1296-98 (2008) (describing the connection and claiming that “there is a direct line connecting *Katz*, Title III, *Keith*, and FISA”).

<sup>199</sup> See *Keith*, 407 U.S. 297, 322-24 (1972).

<sup>200</sup> Americo R. Cinquegrana, *The Walls (and Wires) Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. Pa. L. Rev. 793, 803 (1989).



FISA, in contrast, regulates at least part of the category of surveillance left untouched by *Keith*—surveillance targeting foreign powers or their agents.<sup>201</sup> Specifically, it establishes a framework for the use within the United States of “electronic surveillance”<sup>202</sup> to acquire “foreign intelligence information.”<sup>203</sup> It generally requires the government to obtain a judicial warrant before engaging in such surveillance<sup>204</sup> and creates a special court (the FISA court, or FISC) for the issuance of such warrants.<sup>205</sup> The FISC consists of a small number of federal judges appointed by the Chief Justice. It “meet[s] secretly in a sealed, secure room in Washington, DC” and employs streamlined procedures enabling expedited consideration of the government’s applications.<sup>206</sup> Most significantly, it applies a substantive standard that is considerably more lenient than the

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<sup>201</sup> In so doing, FISA replaced Title III’s “national security exception.” See 18 U.S.C. § 2511(3) (1976), *repealed by* Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801 *et seq.*).

<sup>202</sup> FISA defines “electronic surveillance” to cover, *inter alia*:

(1) the acquisition . . . of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; [or]

(2) the acquisition . . . of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States . . . .

50 U.S.C. § 1801(f).

<sup>203</sup> FISA defines “foreign intelligence information” as follows:

(1) information that relates to, and if concerning a United States person is necessary to, the ability of the United States to protect against —

(A) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(B) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(C) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(2) information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to —

(A) the national defense or the security of the United States; or

(B) the conduct of the foreign affairs of the United States.

*Id.* § 1801(e).

<sup>204</sup> FISA does recognize two narrow exceptions to the warrant requirement. First, where the government does not have enough time to obtain a judicial warrant in advance, the Attorney General may approve the surveillance provided he then seeks a judicial warrant from the FISA court within seventy-two hours of the initiation of the surveillance. *Id.* § 1805(f)(2). Second, FISA permits the Attorney General to authorize warrantless electronic surveillance during the first fifteen days after a declaration of war. *Id.* § 1811.

<sup>205</sup> See *id.* § 1805.

<sup>206</sup> Stephen J. Schulhofer, *The New World of Foreign Intelligence Surveillance*, 17 *Stan. L. & Pol’y Rev.* 531, 534 (2006).

Title III standard for electronic surveillance in the criminal justice context.<sup>207</sup> To obtain a FISA warrant, the government must show probable cause to believe that the surveillance target is the “agent of a foreign power.”<sup>208</sup> As long as the target is not a U.S. citizen or permanent resident alien, however, no showing of likely criminal activity is required.<sup>209</sup> In addition, FISA originally required the government to certify that “the purpose[] of the surveillance is to obtain foreign intelligence information.”<sup>210</sup> However, the USA PATRIOT Act,<sup>211</sup> passed in the wake of the attacks of September 11, 2001, amended FISA to require only that obtaining foreign intelligence information be “a significant purpose of the surveillance.”<sup>212</sup>

Key aspects of the FISA regime—its use of a specialized, secret court with streamlined procedures and its articulation of a more lenient substantive standard than the conventional probable cause requirement—mirror quite closely the standards and procedures that *Keith* had proposed for domestic security surveillance. In that sense, FISA’s regulation of foreign surveillance was at least indirectly inspired by *Keith*’s treatment of domestic surveillance.

*Keith* and FISA also share a more overarching and significant similarity: an unwillingness to grant the executive branch exclusive, unchecked power to engage in electronic surveillance in the name of national security. Just as *Keith* concluded that “Fourth Amendment freedoms cannot properly be guaranteed if domestic security

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<sup>207</sup> See Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1299 (2008).

<sup>208</sup> 50 U.S.C. § 1805(a)(3). The statute defines “foreign power” to include not only any foreign government or faction, but also any “foreign-based political organization, not substantially composed of United States persons” and, perhaps most significantly, any “group engaged in international terrorism or activities in preparation therefor.” *Id.* § 1801(a). In addition, Congress in 2004 expanded the definition of “agent of a foreign power” to include not only persons affiliated with foreign powers as just described, but also non-U.S. citizens or permanent residents who “engage[] in international terrorism or activities in preparation therefor,” even if they are acting alone. *Id.* § 1801(b)(1)(C). This is FISA’s so-called “lone wolf” provision. See generally Tricia L. Bellia, *The “Lone Wolf” Amendment and the Future of Foreign Intelligence Surveillance*, 50 Vill. L. Rev. 425 (2005).

<sup>209</sup> If the target *is* a U.S. citizen or permanent resident alien, the government must show probable cause to believe the target is committing a crime related to clandestine intelligence gathering or comparable offenses. *Id.* § 1801(b)(2).

<sup>210</sup> Pub. L. No. 95-511, § 104(a)(7)(B), 92 Stat. 1789 (1978).

<sup>211</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

<sup>212</sup> 50 U.S.C. § 1804(a)(7)(B), amended by USA PATRIOT Act § 218 (2001). One district court has found FISA’s requirement of “significant purpose” unconstitutional under the Fourth Amendment. *Mayfield v. United States*, 504 F. Supp. 2d 1023, 1039 (D. Or. 2007) (“FISA now permits the Executive Branch to conduct surveillance and searches of American citizens without satisfying the probable cause requirement of the Fourth Amendment.”). *But see United States v. Mubayyid*, 521 F. Supp. 2d 125, 135-36 (D. Mass. 2007) (citing several other courts that have “ruled that FISA does not violate the Fourth Amendment”).

surveillance may be conducted solely within the discretion of the Executive Branch,”<sup>213</sup> FISA represents Congress’s determination to protect constitutional values by subjecting even foreign intelligence surveillance to the constraints of a judicial warrant procedure.<sup>214</sup> In that respect, a key component of FISA is its replacement of Title III’s “national security exception”<sup>215</sup> with a provision stating that that FISA and Title III together “shall be the exclusive means by which electronic surveillance . . . may be conducted.”<sup>216</sup> In other words, the foreign intelligence surveillance covered by FISA is lawful only insofar as it complies with FISA itself. In regulating such surveillance in this manner, Congress did not deny that the Constitution empowers the President to order electronic surveillance for national security purposes.<sup>217</sup> Rather, just as *Keith* held that the President’s constitutional authority to order domestic security surveillance was subject to the constraints of the Fourth Amendment, Congress in FISA exercised its authority to “regulate the conduct of [electronic] surveillance [for foreign intelligence purposes] by legislating a reasonable procedure” and making it “the exclusive means by which such surveillance may be conducted.”<sup>218</sup>

Events relating to the “war on terror” have put pressure on the FISA regime. In late 2005, news broke that the President had authorized the National Security Agency to engage in warrantless electronic surveillance of communications involving suspected terrorists, even when U.S. citizens within the United States are party to the communications.<sup>219</sup> On its face, this surveillance program—known by the government as the Terrorist Surveillance Program, or TSP—would seem to run afoul of FISA. The government resisted that conclusion on two grounds. First, it argued that legislative developments after the attacks of September 11, 2001 (in particular the Authorization for Use of Military Force, passed by Congress on September 18, 2001) had effectively amended FISA to permit warrantless surveillance of this sort. Second, and alternatively, the government contended that to the extent FISA prohibits the President from ordering this surveillance in his capacity as Commander-in-Chief, it unconstitutionally infringes

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<sup>213</sup> *Keith*, 407 U.S. 297, 316-17 (1972).

<sup>214</sup> See Tracey Maclin, *The Bush Administration’s Terrorist Surveillance Program and the Fourth Amendment’s Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. Davis L. Rev. 1259, 1296 (2008) (treating FISA as an extension of *Keith*).

<sup>215</sup> See 18 U.S.C. § 2511(3) (1976), *repealed by* Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801 *et seq.*).

<sup>216</sup> 18 U.S.C. § 2511(2)(f).

<sup>217</sup> See Letter from Curtis A. Bradley, David Cole, Walter Dellinger, Ronald Dworkin, Richard Epstein, Philip B. Heymann, Harold Hongju Koh, Martin Lederman, Beth Nolan, William S. Sessions, Geoffrey Stone, Kathleen Sullivan, Laurence H. Tribe & William Van Alstyne to Sen. Bill Frist, Majority Leader, et al. (Jan. 9, 2006), *reprinted in On NSA Spying: A Letter to Congress*, 53 N.Y. Rev. Books (Feb. 9, 2006) [hereinafter “Letter from Curtis A. Bradley, *et al.*”].

<sup>218</sup> H.R. Rep. No. 95-1283, pt. I, at 24 (1978).

<sup>219</sup> See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

his inherent powers under Article II of the Constitution.<sup>220</sup> Those arguments have faced substantial opposition and critique,<sup>221</sup> and their status remains uncertain.

Meanwhile, Congress has contemplated permanently amending FISA to better accommodate the government's asserted need for greater surveillance authority in connection with the war on terror. As of this writing it remains to be seen what will become of the regulatory regime established by FISA and inspired, albeit indirectly, by *Keith*.

### *Conclusion*

In addition to delivering “a stunning legal setback” to the government's assertions of executive authority,<sup>222</sup> *Keith* won Pun Plamondon and his co-defendants their freedom. Rather than comply with the Court's order to disclose the surveillance records involving Plamondon—records that very likely would have confirmed the lack of any connection between the surveillance and the criminal charges against him—the government simply abandoned the prosecution.<sup>223</sup> The case ended there.

Yet *Keith*'s impact endures. Although the future of the major statutory regime it inspired is now uncertain, *Keith*'s underlying constitutional holding remains in place. And although that holding is formally confined to instances of purely domestic security surveillance, it is still the Supreme Court's most important statement on the general topic of warrantless electronic surveillance. The Court, at least, has stuck with that statement. Indeed, as of this writing, “the Supreme Court has never upheld warrantless wiretapping within the United States, *for any purpose*.”<sup>224</sup>

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<sup>220</sup> See U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), available at <http://news.lp.findlaw.com/hdocs/nsa/dojnsa11906wp.pdf>. For further discussion of the government's statutory argument, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 Colum. L. Rev. 1189, 1250-58 (2006).

<sup>221</sup> See, e.g., Letter from Curtis A. Bradley, *et al.*

<sup>222</sup> Fred P. Graham, *High Court Curbs U.S. Wiretapping Aimed at Radicals*, N.Y. Times, June 20, 1972, at 1.

<sup>223</sup> See Samuel C. Damren, *The Keith Case*, 11 *The Court Legacy* (Historical Society for the U.S. Dist. Ct. for the E.D. Mich.) at 8 (2003).

<sup>224</sup> David Cole, *Reviving the Nixon Doctrine: NSA Spying, the Commander-in-Chief, and Executive power in the War on Terror*, 13 Wash. & Lee J.C.R. & Soc. Just. 17, 34 (2006) (emphasis added).