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United States v. Butenko: Executive Authority to Conduct Warrantless Wiretaps for Foreign Security Purposes

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UNITED STATES v. BUTENKO: EXECUTIVE AUTHORITY TO CONDUCT WARRANTLESS WIRETAPS FOR FOREIGN SECURITY PURPOSES

From the original position that wiretapping was not a search and seizure as the phrase is used in the fourth amendment,[1] the Supreme Court has progressed to the view that warrants must be obtained for all wiretaps conducted for domestic intelligence purposes.[2] Nonetheless, the Court's determination in the domestic area leaves open the question of the president's authority without prior judicial approval to order wiretaps monitoring the activities of foreign powers and agents within this country.[3] When the United States Supreme Court recently denied certiorari in the case of *Ivanov v. United States*,[4] it declined the opportunity to resolve this issue. In *United States v. Butenko*,[5] the Court of Appeals for the Third Circuit held that the government does have the authority to conduct warrantless wiretaps for foreign intelligence gathering. The court in *Butenko* failed, however, to consider several of the factors which influenced the Supreme Court's determination that warrants are required for the surveillance of domestic groups. The Supreme Court should have granted certiorari in order to determine the applicability of these factors to circumstances involving foreign intelligence.

History of Wiretapping and the Fourth Amendment

The fundamental purpose of the fourth amendment is to protect people from unreasonable searches and seizures. It requires that warrants be issued only upon probable cause and that a warrant describe with particularity the place to be searched and the person or item to be seized. The chief function of the warrant requirement is to place the judicial system between the citizen and those who would invade his privacy. The magistrate is to be a neutral person who determines whether or not the present need of the law enforcer is great enough to

1. *See* Olmstead v. United States, 277 U.S. 438 (1928).

2. *See* United States v. United States Dist. Ct., 407 U.S. 297 (1972).

3. "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." *Id.* at 321-22.

4. 419 U.S. 881 (1974).

5. 494 F.2d 593 (3rd Cir.), *cert. denied*, 419 U.S. 881 (1974). Two defendants were charged in this case, Igor Ivanov and John Butenko. This opinion, however, is concerned solely with Ivanov's appeal.

allow the invasion of the citizen's privacy. Furthermore, the magistrate is to provide adequate safeguards to insure that searches and seizures are kept within proper bounds.[6]

In the beginning of this century, physical invasion of the premises was the standard by which the United States Supreme Court determined whether or not the fourth amendment had been violated. Wiretapping, at least when accomplished without physical trespass, was not a fourth amendment infringement.[7] In 1934, Congress passed the Communications Act,[8] section 605 of which made it illegal to intercept *and* divulge the contents of telephone conversations.[9] The measure did not include a provision for the granting of warrants in specific situations. Although the federal government argued that the act was inapplicable to federal agents, the Supreme Court rejected this contention.[10] Subsequently, the Court held that eavesdropping itself, with or without divulgence, violated the fourth amendment if it was accomplished by means of an "unauthorized physical encroachment within a constitutionally protected area."[11] Although the determinative factor was still whether or not a physical intrusion had occurred, the Court suggested that the technicalities of local trespass law need not be met.[12]

In *Katz v. United States*,[13] decided in 1967, the Court effected a major change in the law of wiretapping. In *Katz*, government agents recorded petitioner's telephone conversation by means of an electronic listening device which did not penetrate the phone booth in which he

6. *See* Johnson v. United States, 333 U.S. 10, 14 (1948); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

7. Olmstead v. United States, 277 U.S. 438 (1928). The Court held that the fourth amendment must be interpreted in light of the conditions existing at the time of its adoption. Since telephones did not exist when the Constitution was written, its framers could not have considered wiretapping when they wrote the amendment. *See id.* at 465.

8. 47 U.S.C. §§ 151-609 (1970).

9. Courts generally interpreted the statute to mean that mere interception without divulgence was not sufficient to violate the act. *See, e.g.*, Bufalino v. Michigan Bell Tel. Co., 404 F.2d 1023, 1027 (6th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969); Carswell v. Southwestern Bell Tel. Co., 449 S.W.2d 805, 812 (Tex. Civ. App. 1969).

10. *See* Nardone v. United States, 302 U.S. 379 (1937). The Court examined the legislative history of section 605 and found that there was no discussion by Congress as to whether or not federal agents were included in the provisions of the act. The majority concluded that Congress probably felt that letting some criminals go free was less important than preventing officers from using unethical methods which ignored personal liberty. *See id.* at 382-83. In a subsequent decision arising out of the *Nardone* case, the Court held that the "fruits" of unlawful wiretapping could not be used to convict a person. *See* Nardone v. United States, 308 U.S. 338 (1939).

11. Silverman v. United States, 365 U.S. 505, 510 (1961). In this case, a "spike mike" was located so as to touch the heating duct of the house in which the defendants were living, thus making the entire heating system a conductor of sound.

12. *Id.* at 511.

13. 389 U.S. 347 (1967).

spoke. The Court found that this conduct constituted an unreasonable search and seizure, emphasizing that the fourth amendment protects people, not physical areas.[14] The Court stressed the importance of the judicial safeguards[15] provided by the fourth amendment and concluded that the judgment of government officials did not adequately protect an individual's fourth amendment rights. The justices reasoned that the neutral judgment of a magistrate is required and that because hindsight is not a sufficient protection, authorization must be obtained prior to the surveillance.[16] The Court held that the few exceptions[17] to the warrant requirement do not apply to the wiretapping situation.

The decision in *Katz* would appear to require warrants for all wiretapping. Nevertheless, the Court stated in a footnote that "[w]hether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case."[18] Although *Katz* clearly avoided the question, the executive branch interpreted the case to allow warrantless wiretapping for national security purposes.[19]

United States v. United States District Court: Domestic Security Surveillance

In *United States v. United States District Court*,[20] the Supreme Court addressed the issue it had left open in *Katz*. It analyzed the meaning of national security and the extent to which the executive branch could conduct warrantless wiretaps in matters involving national security. The Court's analysis, however, was limited to domestic situations since the evidence indicated that only domestic groups were involved in the case. The Court declined to make a decision regarding the president's surveillance authority with respect to foreign powers and their activities either inside or outside this country.[21] The majority

14. Justice Stewart offered no historical or constitutional basis for his conclusion but pointed out that the idea that property interests control the government's right to search and seize had been discredited. *See id.* at 353.

15. The Court found that the traditional safeguards were: showing probable cause to an impartial judge before surveillance, following specific limitations established in advance by the court, and notifying the court subsequently of the information obtained during the surveillance. *See id.* at 356.

16. *Id.* at 358.

17. The exceptions the Court discussed were searches incident to an arrest, searches justified on the grounds of hot pursuit, and searches with the suspect's consent. *See id.* at 357-58.

18. *Id.* at 358 n.23. Justice Stewart did not define national security, nor did he indicate who should determine that a case involves national security.

19. *See, e.g.*, United States v. United States Dist. Ct., 407 U.S. 297 (1972).

20. *Id.*

21. *See id.* at 308-09.

concluded that the warrant requirement of the fourth amendment applies to domestic security cases.[22]

The three defendants in *United States District Court* were charged with conspiracy to destroy government property. One of the defendants, an alleged White Panther, was tried for the dynamite bombing of a Central Intelligence Agency office in Ann Arbor, Michigan. The government had conducted warrantless wiretaps which it alleged were motivated by national security concerns since the purpose of the surveillance was to obtain information about a domestic organization that was trying to overthrow the government. The defendants moved pretrial for disclosure of the information obtained from the wiretaps and for a hearing to determine whether the information tainted the evidence which the government intended to offer at trial.[23] The district court ordered disclosure on the basis that the electronic surveillance had violated the defendants' fourth amendment rights.[24] The court of appeals upheld the order,[25] and the Supreme Court affirmed.[26]

Justice Powell, writing for the majority, noted that the fourth amendment is not absolute and that the case required a balancing of the basic values involved.[27] In balancing the duty of the government to

22. *See id.* at 321.

23. *See* United States v. Sinclair, 321 F. Supp. 1074, 1075-76 (E.D. Mich. 1971), *aff'd sub nom.* United States v. United States Dist. Ct., 444 F.2d 651 (6th Cir. 1971), *aff'd*, 407 U.S. 297 (1972). The contents of an illegal wiretap must be disclosed to a defendant so that he can determine whether the information obtained illegally led to any other evidence which was used against him. *See also* Alderman v. United States, 394 U.S. 165, 183 (1969).

24. *See* 321 F. Supp. at 1079-80.

25. 444 F.2d 651 (6th Cir. 1971).

26. 407 U.S. 297 (1972).

27. *See id.* at 314-315. Justice Powell first discussed section 2511(3) of the Omnibus Crime Control & Safe Streets Act of 1968, which states: "Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power." 18 U.S.C. § 2511(3) (1970) (citation omitted). Justice Powell concluded that the section was essentially neutral, neither conferring power on the president nor withdrawing it from him. Thus, the section did not measure the executive branch's authority in this case. *See* 407 U.S. at 303.

protect domestic security against the danger which unreasonable surveillances presented to individual privacy and expression of views,[28] he posed two questions. First, if surveillance were required to protect the domestic security, would the privacy and free expression of the citizens be "better protected by requiring a warrant before such surveillance is undertaken"? Second, would a warrant requirement "unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it"?[29]

The Court found that protecting the country from subversion is a presidential duty[30] and that electronic surveillance might be necessary for the performance of this duty.[31] Moreover, the opinion noted that the executive branch might need to counter subversives with techniques similar to those used by the subversives themselves.[32] At the same time, the Court recognized that these techniques could be used to invade the privacy of "law-abiding citizens"[33] and that therefore fourth amendment safeguards must be applied to these "broad, unexpected invasions by the government into conversational privacy."[34]

The Court found special interests in national security cases that differentiated them from ordinary criminal cases. First, security cases involve a mingling of first and fourth amendment rights.[35] Second, since a government often views those who disagree with its policies with suspicion, fourth amendment protections are even more important in cases of political dissent than in cases of ordinary crime.[36] In this regard, the Court noted the vagueness of the government's concept of protecting the "domestic security."[37]

The majority emphasized that at the heart of the fourth amendment is the requirement that a warrant be obtained whenever practicable so that a search and seizure can represent the views of the magistrate as well as the officers involved. Justice Powell asserted that fourth amendment freedoms could not be adequately protected if the executive branch used its own discretion in conducting domestic security surveillances.[38] An officer of the executive branch, he added, is not an impartial magistrate. Thus Justice Powell concluded that domestic security surveillances require a neutral magistrate's scrutiny "because of the inher-

28. *See* 407 U.S. at 314-15.
29. *Id.* at 315.
30. *See* U.S. CONST. art. II, § 1.
31. *See* 407 U.S. at 310.
32. *See id.* at 312.
33. *Id.*
34. *See id.* at 313.
35. *Id.*
36. *See id.*
37. *Id.* at 313-14.
38. *See id.* at 317.

ent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."[39] In addition, the Court rejected post-surveillance judicial review as an adequate safeguard because it would be used for only those surveillances which actually resulted in prosecutions.[40]

United States v. Butenko: Foreign Security Surveillance

In *United States v. Butenko*,[41] the Court of Appeals for the Third Circuit considered the issue of the president's authority to conduct warrantless wiretaps for foreign rather than domestic intelligence purposes. Three related questions were presented: 1) whether the fact that foreign intelligence is involved eliminates the necessity of applying the fourth amendment requirement of prior judicial review;[42] 2) whether, if prior judicial authorization is not required, post-surveillance review is nonetheless necessary;[43] and 3) whether the probable cause standard in foreign intelligence matters should be the same as that in criminal cases.[44]

The two defendants in *Butenko*, Igor A. Ivanov, a Soviet national, and John Butenko, an American by birth, were convicted in federal district court of conspiring to transmit United States defense information to a foreign government.[45] After the defendants were convicted and while their petition for certiorari was pending, the government revealed that it had intercepted the defendants' conversations during two different periods of time.[46] The Supreme Court granted certiorari and re-

39. *See id.* at 320.

40. The government proposed four reasons why a warrant should not be required prior to surveillance. First, such a requirement would obstruct the president in carrying out his constitutional duty to protect domestic security. Second, the surveillance involved was for the purpose of gathering information about subversive forces. Third, courts have neither the knowledge nor the techniques necessary to protect national security. Finally, disclosure of secret information to a magistrate would pose a serious threat to national security and to the lives of informants and agents. *Id.* at 318-19.

41. 494 F.2d 593 (3rd Cir.), *cert. denied*, 419 U.S. 881 (1974).

42. *Id.* at 602.

43. *Id.* at 606.

44. *See id.*

45. *Id.* at 596. The information which the defendants conspired to transmit to the Union of Soviet Socialist Republics was the plan of a command and control system of the Strategic Air Command. *Id.* at 616.

46. The government conducted two sets of interceptions. The first set covered the period between May 15, 1963 and June 11, 1963 and the period between June 27, 1963 and August 13, 1963. *Id.* at 617. Since the government did not disclose the contents of the second set to the defendants, the dates which that set concerned are unknown. These surveillances occurred before the *Katz* decision, but the court did not review the method by which the wiretaps were installed because the government did not rely on pre-*Katz* law. *See id.* at 604 n.42.

manded the case to the district court, holding that records of any illegal surveillance of the defendants must be disclosed to them. The district court was instructed to determine whether the wiretapping had violated the fourth amendment rights of either of the defendants. If the surveillances had been illegal, the district court was to determine whether any of the information obtained had tainted the convictions.[47]

The district court found that information obtained from the first set of interceptions, which the government admitted had been illegal, had not tainted the defendants' convictions.[48] The prosecution claimed that the second set of interceptions had been legal because the surveillance had been conducted for the purpose of gathering foreign intelligence. The court held that these interceptions, which it examined *in camera*, had violated neither section 605 of the Communications Act of 1934[49] nor the fourth amendment. Therefore the government was not required to disclose any of the records of the wiretaps to the defendants.[50]

Ivanov challenged the ruling on the second set of interceptions, urging that they did violate both section 605 and the fourth amendment. A panel of the Court of Appeals for the Third Circuit agreed as to section 605 and remanded the case to the district court for disclosure of the contents of the second set of tapes to Ivanov and for a hearing to determine whether Ivanov's conviction had been tainted by the evidence.[51] Subsequently, the court of appeals granted the government's petition for a rehearing en banc.[52]

The issue on rehearing was whether the second set of surveillances had been illegal and, if it had been, whether disclosure of this set of interceptions to the district court *in camera* had provided sufficient compliance with the Supreme Court's instructions on remand.[53] The court ruled that disclosure of the second set of interceptions should be required if the electronic interceptions had been illegal.[54] Whether or not the government could be compelled to reveal legally obtained surveillance was a matter within the discretion of the trial judge;[55] therefore,

47. Alderman v. United States, 394 U.S. 165, 186 (1969).

48. *See* United States v. Ivanov, 342 F. Supp. 928 (D.N.J. 1972). Ivanov challenged this ruling, asserting that the loss or destruction of part of the records of the first set of interceptions rendered the government incapable of showing that his conviction was not tainted. A panel of the Court of Appeals for the Third Circuit affirmed the district court's findings. Ivanov's petition for a rehearing was denied by the court. *See* 494 F.2d at 597.

49. 47 U.S.C. § 605 (1970).

50. United States v. Butenko, 318 F. Supp. 66 (D.N.J. 1970).

51. *See* 494 F.2d at 597.

52. *See id.*

53. See text accompanying note 47 *supra.*

54. *See* 494 F.2d at 598. The purpose of the disclosure is to insure that evidence used against the defendant was not obtained from the illegal wiretaps.

55. The circuit court applied the reasoning of Taglianetti v. United States, 394

disclosure of legal interceptions should be required only if a trial judge had abused his discretion.[56]

In ruling on the actual legality of the interceptions, the court held that although the president in exercising his power to conduct foreign affairs is bound by the fourth amendment, *prior* judicial authorization of wiretaps used to gather foreign intelligence information is not necessary and a warrant is not required.[57] Thus, the second set of interceptions had been legal. The court admitted that prior judicial review might be beneficial in ensuring that the president was not using his foreign affairs power as a coverup to conduct surveillance of domestic subversives. Nonetheless, the court held that the best solution, in light of the strong public interest in the efficient conduct of the president's foreign affairs network, was to rely on the good faith of the president and the sanctions available through post-surveillance review.[58]

The court observed that post-surveillance judicial review is an effective safeguard for fourth amendment rights and that it should be used in foreign intelligence cases to prevent any abuse resulting from the lack of a warrant requirement. The reviewing judge should make certain that the actual purpose of the surveillance was to obtain foreign intelligence and not to find evidence of a crime or to eavesdrop on domestic subversive organizations.[59]

Moreover, the court held that when the government is gathering foreign intelligence, the probable cause standard used in criminal cases should be modified by deleting the requirement that the officer have a reasonable belief that criminal activity has taken place or will occur. The court concluded that requiring government officers to have a reasonable belief that a crime is going to be committed would be ignoring that the object of surveillance is to gather information necessary for making informed judgments in foreign affairs, not to detect crime.[60]

In its conclusion, the court stated that the case required the balancing of the president's duty to conduct foreign affairs with society's interest in privacy. Noting that the fourth amendment prohibits only unreasonable searches and seizures, the court reasoned that when considered in light of the country's interest in self-defense, the instances of

U.S. 316 (1969). In that case, the Supreme Court held that when surveillance was not illegal, disclosure depended upon whether the factual and legal issues in dispute could be accurately determined and resolved without knowledge of the information obtained. *See* 494 F.2d at 598. The purpose of disclosing the contents of legal wiretaps to the defendant is to aid him in preparing his defense. Thus, disclosure is similar to other discovery procedures.

56. 494 F.2d at 598.
57. *See id.* at 603.
58. *See id.* at 605.
59. *Id.* at 606.
60. *See id.*

warrantless wiretapping had not been unreasonable and had not infringed upon Ivanov's fourth amendment rights.[61]

A Critical View of United States v. Butenko

The Court of Appeals for the Third Circuit thus sanctioned the creation of another exception to the warrant requirement by holding that prior judicial review of wiretaps is not necessary when the government's purpose is foreign intelligence gathering. Since the court concluded that government officials did not need to find probable cause that criminal activity had occurred or was going to take place and left the task of establishing standards to the executive branch, the rule established by the decision can be abused easily. Because the executive branch's primary role is to ensure that the laws are enforced, it will probably emphasize its investigatory duties at the expense of protecting rights to privacy; it is by no means an unbiased and neutral party. The historical tendency of governments to suppress political dissent[62] should be a further incentive against placing the executive branch in the anomalous position of enjoying the discretion to determine when warrantless wiretaps are proper. The combination of dispensing with the probable cause requirement and giving an interested party the discretion to determine when to wiretap is wholly unsatisfactory.

Another shortcoming of the *Butenko* decision is that the court failed to define foreign intelligence. Not only is the concept of foreign intelligence extremely vague, but also a distinction between foreign and domestic threats to the nation cannot readily be drawn, particularly when a situation involves varying degrees of collaboration between domestic groups and agents of foreign powers.[63] A domestic dissident may have purely personal contact with a foreign agent, yet the government may view this contact as a sufficient basis for invading the dissident's privacy. The executive branch can easily abuse its authority to wiretap by classifying the information it seeks as foreign, not domestic. Former Attorney General John Mitchell recognized the problems of distinguishing foreign and domestic threats when he stated:

> National security is indivisible. You can't separate foreign from domestic threats to the government and say that we should meet one less decisively than the other. I don't see how we can separate the two, but if it were possible I would say that experience has shown greater danger from the so-called domestic activity.[64]

In fact, his statement indicates that if warrants are necessary for the

61. *See id.* at 608.

62. *See* 407 U.S. at 314.

63. *Id.* at 309 n.8.

64. Note, *The Court & Electronic Surveillance: To Bug or Not to Bug—What is the Exception?*, 47 ST. JOHN'S L. REV. 76, 105 (1972).

monitoring of domestic activities, they should certainly be required when the surveillance focuses on foreign threats.

Furthermore, the *Butenko* decision limits judicial review of foreign intelligence wiretaps to cases which result in prosecution or in which the subjects somehow learn of the surveillance and sue for damages or an injunction. Such retrospective judicial scrutiny plays no part in determining whether countless unrevealed surveillances were proper. Since, as the court stated in *Butenko*,[65] the main purpose of foreign security surveillances is to gather information rather than to prosecute, it seems likely that such searches will be revealed far less often than wiretaps conducted for the detection of crime. Abolishing the warrant requirement in foreign intelligence cases thus significantly reduces the scope of the judiciary's role as final arbiter of the constitutionality under the fourth amendment of searches and seizures.[66]

A Comparison of United States District Court and Butenko

Similarities of Foreign and Domestic Surveillance

The Supreme Court's decision in *United States v. United States District Court* should not be viewed as limiting the warrant requirement to situations involving domestic intelligence gathering. Although the Court in *United States District Court* had occasion to consider only the domestic surveillance context, it can be demonstrated that the interest of the government, the interests of the people whose privacy is invaded, and the effects of not requiring a warrant are the same whether the surveillance concerns domestic or foreign activities. Moreover, each of the particular factors which influenced the Court's decision in *United States District Court* to require warrants applies with equal force to the foreign situation.

The executive branch's interest in both the foreign and domestic aspects of national security is the preservation of the nation's existence.[67] Since the main purpose of both types of surveillance is therefore to gather information about threats to national security, the government's need to obtain foreign intelligence is no more immediate than its need to gather domestic intelligence. In fact, the need for foreign intelligence may, in many cases, be less immediate. Speed is unnecessary in long-range surveillance, and the threat to national security may well be remote when the government is merely seeking information concerning the policies of other nations. Moreover, as former Attorney General Mitchell has stated, it is well recognized that domestic groups can create at least as great a threat to the nation's existence as can foreign coun-

65. *See* 494 F.2d at 606.
66. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
67. *See* 407 U.S. at 311-12; 494 F.2d at 608.

tries.[68] Thus the threats from groups that are entirely domestic and from groups with ties to foreign nations are equivalent.

If either foreign or domestic security surveillances are conducted without warrants, the result is an infringement of interests protected by the fourth and first amendments. Both the fourth amendment's protection against unreasonble invasions of privacy and its guarantee that searches shall be specific are threatened. Any specificity in searches performed without warrants would result solely from the self-imposed restraint of government officials and not from the decision of a magistrate acting under constitutional restraints. Thus in both domestic and foreign national security cases, the lack of a warrant requirement can lead to general searches. Furthermore, once the search in either area becomes general, the distinction between domestic and foreign intelligence can easily be obscured, with the result that general searches are allowed in both situations. The stricter requirements for domestic intelligence gathering can thus become meaningless, as all information gathering can be tied more or less closely to foreign intelligence.[69]

Furthermore, regardless of the purpose of the surveillance, warrantless wiretaps endanger the first amendment guarantee of freedom of speech. The absence of the warrant requirement in either domestic or foreign intelligence situations inhibits free communication by increasing the threat that telephone conversations will be monitored. This chilling effect reaches not only persons with criminal or subversive intentions, but also those who might become objects of governmental scrutiny merely because they criticize policies of the government.

Moreover, in each context, a requirement that the fruits of an illegal wiretap cannot be used in a prosecution does not prevent significant infringement of fourth and first amendment freedoms. In both domestic and foreign intelligence, the government is more interested in gathering information than in prosecuting. The government can evade review simply by deciding not to prosecute, thus maintaining the secrecy of its operations.

68. See note 64 *supra.*

69. *See* Zweibon v. Mitchell, 363 F. Supp. 936 (D.D.C. 1973). Recently, some instances of the executive branch's use of its wiretapping powers have been made public. John Erlichman, former advisor to former President Nixon and a principal figure in the Watergate scandal, justified burglarizing the office of Daniel Ellsberg's psychiatrist by asserting a need to find out whether a foreign spy ring was involved in the Pentagon Papers. (Daniel Ellsberg is a former employee of RAND who was instrumental in giving the Pentagon Papers to the press. The Pentagon Papers contain diplomatic communications concerning the early part of the Vietnamese war during the Kennedy and Johnson administrations.) This example suggests the potential breadth of the executive branch's power; the same reason could be given for wiretapping in connection with any event which was adverse to the executive branch's interest. *See* Nesson, *Aspects of the Executive's Power over National Security Matters: Secrecy Classifications & Foreign Intelligence Wiretaps,* 49 IND. L.J. 399, 417 (1974).

Factors Balanced by the Courts

Both the United States Supreme Court in *United States District Court* and the court of appeals in *Butenko* applied balancing tests. The Supreme Court balanced the government's duty to protect domestic security against the threat to individual privacy and freedom of expression created by unreasonable surveillance.[70] The court in *Butenko* balanced the president's authority in foreign affairs with society's interest in privacy.[71] An examination of *Butenko* shows that the court greatly biased its discussion in favor of the power of the executive branch, despite the fact that the privacy of United States citizens as well as that of foreign citizens was involved. In contrast, although the Supreme Court discussed executive authority and considered the problems that a warrant requirement might cause the executive branch, the justices accorded individual privacy and freedom of expression greater deference.[72]

The Supreme Court in *United States District Court* discussed four factors which influenced its decision that on balance, warrants should be required in domestic security cases: 1) the historical judgment, implicit in the fourth amendment's contemplation of prior judicial review, that without the warrant requirement, the government's desire to obtain information would inevitably lead it to invade individuals' privacy; 2) the mingling of first and fourth amendment rights in national security cases; 3) the failure of post-surveillance judicial review to reach wiretaps which do not result in prosecutions; and 4) the fact that domestic security surveillance does not fit within any of the present exceptions to the warrant requirement and that it does not justify the creation of another exception.[73] The Supreme Court held that these considerations outweigh the interest of the executive branch in investigating domestic threats to national security unhindered by a warrant requirement. Apparently the court of appeals in *Butenko* failed to accord the interests in individual freedom the same weight given them by the Supreme Court in *United States District Court*, choosing instead to emphasize the power of the executive branch in foreign affairs. This emphasis seems particularly misguided in view of the fact that the foreign intelligence activities occurred within United States borders and were directed in part at United States citizens.

Moreover, the court of appeals failed to discuss the first three factors upon which the Supreme Court relied, even though these factors apply equally to the situation in *Butenko*. First, the appellate court made

70. *See* 407 U.S. at 319-20.
71. *See* 494 F.2d at 608.
72. *See* 407 U.S. at 319-20.
73. *Id.* at 317-20.

no attempt to explain why the fourth amendment protections of individual privacy would be less threatened by executive discretion in foreign intelligence gathering than in domestic security cases. Second, the *Butenko* decision made no evaluation of the infringment of first amendment rights which electronic surveillance could involve. As Justice Powell noted in *United States District Court*: "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.' "[74] The ability to secure foreign intelligence information is also a vague concept which threatens political dissent. Moreover, as mentioned above, if general searches are permissible in foreign intelligence matters, the distinction between foreign and domestic intelligence can readily be blurred. Third, the court in *Butenko* was not concerned with the fact that post-surveillance judicial review reaches only wiretaps that result in prosecutions. Thus, the court completely overlooked the concerns expressed by Justice Powell in *United States District Court* that post-surveillance judicial review is not an adequate protection of first and fourth amendment rights.[75]

The court of appeals in *Butenko* did discuss the fourth factor considered by the Supreme Court in *United States District Court*—the exceptions to the warrant requirement. The circuit court placed great emphasis on a purported analogy between the public interest in obtaining foreign intelligence information and a similar strong public interest in home visits by welfare workers.[76] The home visitation warrant exception, however, does not involve a concept so vague as foreign intelligence. Furthermore, it is at least possible to give notice of visits to welfare recipients. In contrast, people whose telephones are wiretapped under a foreign intelligence exception may never learn of the intrusion. The court also failed to note that the two situations affect the freedom of speech differently. Regardless of other constitutional problems,[77] a home visit inhibits speech only during the actual visit. The potential threat of foreign intelligence surveillance, however, may inhibit a person's speech each time he uses the telephone. Moreover, the invasion of privacy in a home visit lasts for a short and definite period of time while electronic surveillance may invade a person's privacy for long and indefinite periods. Therefore, the analogy between the home visitation

74. *Id.* at 314.

75. *See id.* at 317-18.

76. *See* 494 F.2d at 605; Wyman v. James, 400 U.S. 309 (1971). The significance of this case is that the court found that welfare workers need not obtain warrants prior to home visits because the visits are not actual searches. Thus, the analogy to foreign intelligence gathering is distinctly in error because there is no question that electronic surveillance constitutes a search.

77. *See* Wyman v. James, 400 U.S. 309 (1971).

cases and the foreign intelligence situations is wholly unconvincing. In addition, whatever validity the analogy might conceivably have would seem to apply equally to domestic intelligence operations. In sum, the court in *Butenko* blithely adopted an exception to the warrant requirement despite the Supreme Court's refusal to do so and without an adequate explanation as to why the reasoning in *United States District Court* was inapplicable to the circumstances in *Butenko*.

Aside from ignoring the first three factors delineated by the Supreme Court in *United States District Court*, and dealing inadequately with the fourth factor, the court in *Butenko* relied on two further rationales for its different decision. It implied that the requirement of a warrant for foreign intelligence gathering would at times force the president to act illegally in order to perform his constitutional duties when he needed to act quickly and secretly.[78] Again, the court offered no reasons why this possibility should be more likely in foreign intelligence contexts than in domestic investigations. Moreover, the likelihood of a president acting illegally does not justify sacrificing individual rights in order to eliminate the possiblity of illegality. The judiciary and the executive branch should instead develop an alternative procedure for emergencies.

The opinion also stated that requiring warrants in foreign intelligence cases would cause the executive department undue hardship. Thus, requiring these officials to determine when a warrant is or is not needed would seriously handicap the executive department's performance of its foreign affairs duties.[79] This reasoning, too, is specious, as officers encounter the same problem when monitoring domestic activities and suspected crime, yet in neither of these areas has the Supreme Court found warrantless wiretaps justified.

Conclusion

The potential for presidential illegality rationale and the undue hardship rationale, combined with the invalid analogy between the warrantless wiretaps to gather foreign intelligence and home visits by welfare workers, offer scant support for the *Butenko* decision. The insufficiency of the *Butenko* departure from the *United States District Court* holding is further elucidated by a comparison of the two cases, because the interests of the government and the individual, as well as the threats to individual freedoms and governmental effectiveness, appear to be the same in each case. The failure of the court in *Butenko* to recognize the threats to first amendment rights, its inadequate consideration of potential invasions of privacy, and its almost total deference to

78. *See* 494 F.2d at 605.
79. *Id.*

the arguments asserted by the government were manifestly contradictory to the teachings of the Supreme Court in *United States District Court*. The Supreme Court should have granted certiorari in the case of *United States v. Ivanov*[80] and articulated the constitutional basis, if any, for an exception to the warrant requirement when the government is conducting wiretaps to gather foreign intelligence.

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80. 419 U.S. 881 (1974).

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