UNCONSTITUTIONAL SURVEILLANCE & UNITED STATES V. U.S. DISTRICT COURT: WHO THE WINNER IS MAY BE A SECRET – PART 1

[Given the current surveillance state situation in America, the *Keith* case, formally known as *United States v. United States District Court*, is one of the most important cases from our recent past. But I don't really believe you can understand or know the law of a case, without really understanding the facts. The *Keith* case doesn't have simple facts, but they are fascinating and instructive. So bear with me – this is going to take awhile, and will be laid out over a series of four posts. What follows today is Part I. – Mary]

It was a time of war. America had been attacked in the Gulf of Tonkin. The National Security Agency (NSA) and our military had reassured us this was true. Our national security apparatus, Congress and press had joined behind the office of the President to lead us into a series of forays (Vietnam, Laos, Cambodia) that would leave tens of thousands of American soldiers dead and many times that wounded physically or mentally, while at the same time decimating over three million Vietnamese and over a 1.5 million Laotians and Cambodians.

At home, we were working our way through the civil rights movement, dealing with the cold war and threats of Russian nuclear weapons and witnessing anti-war protests that left students dead and buildings bombed. Algeria was hosting U.S. fugitives from justice, Eldridge Cleaver and Timothy Leary, while Cuban connections were alleged to be behind much of the organized anti-war movement.

Court martial proceedings had begun for the My Lai killings with polls showing most of America objected to the trial. President Nixon would later pardon Lt. Calley for his role. A trial had also, briefly, seemed to be in the works for the "Green Beret Affair," the killing of Thai Khac Chuyen by Green Berets running an intelligence program called Project GAMMA. The investigation began after one of the soldiers assigned to the Project became convinced that he was also being scheduled for termination. Charges in the Green Beret Affair would be dropped after the CIA refused to make personnel available, claiming national security privileges.

Against this backdrop, Nixon and his campaign manager – attorney general, John Mitchell (the only attorney general to date to be convicted for illegal activities), began a warrantless wiretapping program, authorized only by the White House and Mitchell, with no oversight and no review by an independent magistrate. A secret program that they claimed was necessary for reasons of national security.

This is part of the complex and ongoing story of United States Executive Branch violations of law, and the role the judiciary has played, or failed to play, to address those illegal and unconstitutional activities. One of the central chapters in this story, to date, involves the efforts of the Department of Justice (DOJ) to force Federal District Court Judge Damon Keith of the Eastern District of Michigan, in the case of United States v. U.S. District Court (the "Keith Case"), to support the Executive's power to disregard the Constitution and domestic law during a time of war.

The Bombing and Indictments.

The important cases never have easy facts. The progenitor of the Keith Case was United States v. Sinclair. The Sinclair prosecution was based on indictments against White Panther members, John Sinclair, Lawrence (Larry) "Pun" Plamondon and John Waterhouse Forrest for the September

29, 1968 bombing of a CIA office in Ann Arbor, Michigan. After the bombing, Plamondon went underground, traveling to various foreign countries before landing in Algeria. By 1969 he was on the FBI's 10 Most Wanted list.

The lure of Michigan was too strong for him to stay away, though. He was arrested after being pulled over for throwing beer cans out of his car. In *U.S. v. Sinclair*, Plamondon was represented by the famous defense lawyer, William Kunstler and the case was assigned to Judge Damon Keith. Early in the case, Kunstler filed a Motion to require the Department of Justice to turn over any electronic surveillance of the defendants, including any illegal surveillance.

That Motion relied in part upon a case decided just a year or so earlier, Alderman v. United States (March 10, 1969), where the Supreme Court had ruled that the government had a duty to turn over illegal surveillance information to the defense.

What the *Alderman* Case Meant.

In *Alderman*, the Department of Justice (DOJ) admitted they had engaged in illegal surveillance (not authorized by any warrant), but argued that the court should let the illegal surveillor – DOJ – unilaterally review the surveillance information to determine whether any of the information was "relevant" to their prosecution case. DOJ would not be required to turn over any of the illegal surveillance information unless they made the in-house determination of relevance to the prosecution's case in chief. .

The Supreme Court response was, roughly translated: *Nice try, but no*. With that argument shot down, DOJ made a fallback argument. They should only have to provide the surveillance information to a judge for review in camera and only any information that the judge, after review, determined was "arguably relevant" to the criminal case at hand would need to be

provided to the defense.

DOJ argued that this process — of blocking defense access — was necessary because of the "potential danger to the reputation or safety of third parties or to the national security." The Supreme Court was less than impressed by this argument, finding instead that a fair adversary proceeding required the turnover of all the illegal surveillance:

> Although this may appear a modest proposal, especially since the standard for disclosure would be "arguable" relevance, we conclude that surveillance records as to which any petitioner has standing to object should be turned over to him without being screened *in camera* by the trial judge.
>
> …Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.
>
> . . . It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to national security or third-party interests. But this is a choice the Government concededly faces with respect to material which it has obtained illegally and which it admits, or which

> a judge would find, is arguably relevant to the evidence offered against the defendant. (emph. added)

The Illegal Surveillance of Plamondon.

The U.S. Attorney handling the Sinclair case indicated that he was unaware of any such illegal surveillance, but that he would have Main Justice check with the FBI. When the word came back that there had been illegal surveillance of Plamondon, things changed. Based on Alderman, it would seem clear that the information was well on its way to being turned over to the defense. Except that it wasn't.

The US Attorney did provide surveillance logs to Judge Keith *in camera* but, despite the Supreme Court recent ruling in *Alderman*, DOJ argued that Judge Keith could not make the information available to the defendants. The DOJ argued, just as it had (and lost) in *Alderman,* that there were national security aspects to the case.

So what was new and different? Well, the Government upped the *ante* over their bid in *Alderman* in three ways. First, they claimed that the wiretaps were not actually illegal and instead were somehow authorized by exception pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Next, and somewhat overlapping, they argued that even though the wiretaps were on their face warrantless and illegal, there were not, actually illegal because of the so-called "Mitchell Doctrine." These elements of what the case have received the bulk of the scrutiny and helped form some of the basis for the FISA legislation which Congress later passed. There is another place where the DOJ upped the ante, but we'll get to that later. For now, let's look at the arguments.

The Omnibus Crime Control and Safe Streets Act of 1968 Argument.

This argument went something like this. The

Omnibus Crime Control and Safe Streets Act of 1968 (Omnibus Act) spells out how warrants will be handled for criminal cases (including making violations of the warrant requirements of the Omnibus Act a serious crime) except that the Omnibus Act specified an area where it did not apply.

> Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) 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."

DOJ argued that this exception to coverage was also intended to be a Congressional recognition of, or maybe even a grant to, the President of the power to engage in warrantless wiretaps.

The Mitchell Doctrine Argument.

The Mitchell Doctrine argument went a few steps further. It was based on a claim of inherent power. This Doctrine asserted that the Attorney General, as a representative of the Executive Branch, had the inherent constitutional power to authorize electronic surveillance without a warrant in "national security" cases and to unilaterally determine whether a particular circumstance falls within the scope of a "national security" concern.

The Mitchell Doctrine was the DOJ's end run around Alderman, but the Sinclair case was not the only case where DOJ was attempting that end run.

> While defense lawyers and Judge Damon J. Keith sat open-mouthed, the government tendered an affidavit from the attorney general, John Mitchell — soon to be of Watergate infamy. Mitchell stated in writing that he, on behalf of the president, had the authority to order wiretaps without judicial approval to "protect the nation from attempts of domestic organizations to attack and subvert the government."
>
> …
>
> By itself, this case might have been a weird wrinkle in turbulent times. When comparing notes nationally, though, progressive defense lawyers realized there was a pattern. Mitchell had done the same thing in the Chicago 7 / 8 case [internal link] and in a Black Panther trial in California. Something was up. The attorneys came to a conclusion that shocked them: The Justice Department was openly demanding judicial approval of a scheme in which the president alone, without legislative advice or consent, without judicial oversight, decided when the Bill of Rights [internal link] would be suspended, and which citizens' rights would be overborne. The designation "subversive" would not be defined.

> “Probable cause,” the ancient Constitutional requirement, would not be shown. The lawyers were aghast not only
>
> at the arrogance of the government’s position. They feared that the government might win. Mitchell’s Justice Department would not have opted for this strategy – no longer denying the illegal bugs, but admitting them, and telling the courts to find them legal – unless they were confident in their position.
>
> … two weeks previously, a Nixon administration official (H.R. Haldeman …) had claimed that the Democrats were giving “aid and comfort to the enemy.” Under the government’s scheme, such a designation would open even the political party out of power to warrantless eavesdropping by whoever held the White House.

As a result of the government’s coordinated, nationwide strategy invoking the Mitchell Doctrine, by the time Judge Keith ruled in the Sinclair case, there were several other cases at various stages including one in the Central District of California, United States v. Smith, where another judge’s ruling was very influential.

[Part II will how the District Court judges dealt with the Mitchell Doctrine in *Smith* and *Sinclair*, the curious action of the DOJ in response thereto and the eventual Supreme Court decision.]