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POLITICAL SURVEILLANCE AND
THE FOURTH AMENDMENT

Alan Meisel*

Pointing out recent problems caused by political surveillance, the author traces the historical origins of the fourth amendment as a foundation for a constitutional challenge to such activity. Mr. Meisel also appraises other possible remedies against unauthorized surveillance for political purposes and the problems of implementation.—The Editors

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 seized.1

Numerous examples have come to light in recent years, and especially in recent months, of instances of surveillance activities carried out by government agents. Some of the disclosures have come from the agents who conducted the surveillance,2 some from the subjects of the surveillance.3 Surveillance efforts have taken a variety of forms:4 informers, wiretaps, electronic listening devices, bugged informers, and photography are a few of the more common methods. Nor have the objectives of the surveillance been unidimensional. While much surveillance is undertaken for the prevention and detection of crime, perhaps as frequently it is employed to suppress opposition to official government policy.

The efforts of law enforcement officials and executive policy mak-

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1. U.S. CONST. amend. IV.


3. For example, the major television networks have produced and broadcast three programs dealing with surveillance within a recent one-month period in which numerous individuals gave accounts of having discovered that they had been the victims of official surveillance. C.B.S. Reports, Under Surveillance, Dec. 23, 1971; A.B.C., Assault on Privacy, Jan. 8, 1972; N.E.T., Surveillance, Who’s Watching, Jan. 31, 1972.

4. E.g., the parabolic microphone, miniaturized electronic transmitters and receivers, and the laser beam are some of the more sophisticated and pervasive techniques. See A. Westin, PRIVACY AND FREEDOM, ch. 4 (1967); A. Miller, THE ASSAULT ON PRIVACY, ch. 1 (1970).
ers to silence voices expressing doubt or disagreement, or which potentially may express disagreement, with official policies is a problem of major significance today. While it may be of immediate concern only to a relatively small number of outspoken individuals and groups, any strategy to suppress political dissent will inevitably have unfortunate longer-range consequences for greater numbers of individuals, if not for the socio-political structure of the entire society. The use of Internal Revenue Service audits against political foes of the incumbent administration; the employment of agents provocateurs to incite acts which will in turn create a backlash of repressive sentiment; the electronic bugging of the headquarters of one of the national political parties by agents either in the employ of the other party or of the government; the attempts by the Department of Justice to prevent through injunctive proceedings the publication of the “Pentagon Papers”8 and the ensuing prosecution of those who admittedly made available the documents to the press; the political attacks by leading members of the executive branch of the federal government, chief among them the Vice-President, upon the communications media; the attempts of a Congressional sub-committee to subpoena the unused portions of television videotapes of a documentary critical of the Department of Defense; and the use of government-paid and recruited spies to gather information on individuals and groups suspected of favoring solutions to pressing social problems different from those advocated by the official policy makers12 are

7. Szulc, Democratic Raid Tied to Realtor, N.Y. Times, Jun. 19, 1972, at 1, col. 7. This, of course, is the now infamous Watergate affair.
9. This was the prosecution of Daniel Ellsberg and Anthony Russo which ended in a mistrial and dismissal of the prosecution as a result of “improper government conduct” consisting in “an unprecedented series of actions” involving illegal surveillance and conventional search and seizure (if not theft) which was not revealed to the defendants. Arnold, Pentagon Papers Charges are Dismissed, N.Y. Times, May 12, 1973, at 1, col. 8.
12. On March 8, 1971, the local office of the F.B.I. in Media, Pennsylvania was broken into by a group identifying itself as the “Citizens Committee to Investigate the F.B.I.” Documents were removed from the F.B.I.’s files, duplicated, and distributed to the news media revealing that the
only a few varied examples of the actions undertaken at different levels and by different branches of government to suppress or eliminate opposition to official policies and opinions. As Justice Douglas has stated:

[W]e are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned.13

It is probably futile and inconclusive14 to discuss the frequently made contentions that government repression is greater today than at any other time in this nation's history, that government repression is as great as or greater than that in so called totalitarian nations, or that technological improvements in the methods of surveillance render the efforts of governmental suppression activities more effective and pervasive than ever before.15 What is of primary importance is the development of methods, both political and legal, for the control of any and all efforts of officialdom to repress legitimately expressed dissent. The reason is clear: "More than our privacy is implicated. Also at stake is the reach of the Government's power to intimidate its critics."16

It is the thesis of this article that the fourth amendment to the Constitution provides a foundation for the development of a doctrine for the control of governmentally inspired surveillance. In addition to their obvious application to trespassory searches and seizures of tangible objects, the safeguards of the fourth amendment have already been construed to apply to wiretapping17 and to non-trespassory electronic eavesdropping.18 On the other hand, the Court has explicitly rejected the surveillance practices of government agencies were deliberate, systematic, and officially sanctioned—and often conducted for the illegitimate purposes of suppressing political expression as well as for uncovering evidence of crime. See N.Y. Times, Mar. 24, 1971, at 24, col. 3. The "Media Papers," as the purloined documents have come to be known, have been published in full in Win, March 1 & 15, 1972. Win is a twice-monthly publication of the War Resisters League of Rifton, N.Y.

14. See id. at 297, text accompanying n.10.
application of the Fourth Amendment to electronic eavesdropping, whether trespassory or non-trespassory, accomplished by means of a "bugged" informer. And when surveillance occurs in the context of "political" expression, the case for the expansion of fourth amendment protection is even more compelling than where ordinary "criminal" activity is under surveillance.21

The scope of this article will of necessity be limited. The effort here will be directed toward designing—or, perhaps, more humbly put, discerning—fourth amendment policies and safeguards against the use by law enforcement officials and other government operatives of surveillance techniques to suppress dissenting ideas, opinions, policies, and personal and social associations.

I. The Political Origins of the Fourth Amendment

The historical background against which the fourth amendment was drafted and incorporated into the Bill of Rights suggests that surveillance conducted by government agents is subject to the limitations upon governmental power embodied in the fourth amendment. In the century between the English civil war and the American Revolution, agents of the British crown utilized two devices—writs of assistance and general warrants—to unearth evidence of criminal offenses. These devices had

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21. The distinction between "political" and "ordinary" or "traditional" crimes is one that eludes facile embodiment in words. See note 37 infra. However, Mr. Justice Powell, speaking for a unanimous Court, recognized the distinction, though without attempting to explain it. See United States v. United States District Court, 407 U.S. at 313.
22. The statute of 13-14 Charles II, ch. 11, § 5 (1662) empowered revenue officers to employ writs of assistance to search for smuggled goods. The writs were general in nature, failing to specify what places were to be searched, but rather leaving it to the absolute discretion of the official conducting the search to determine the circumstances under which the writ was to be executed. See generally N. Lasson, The History and Development of the Fourth Amendment to the United States Constitution, ch. 2 (1937); Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 360, 364-65 (1921); 2 T. May, The Constitutional History of England 245-47 (1863); Boyd v. United States, 116 U.S. 616, 624-25 (1886).
23. The use of general warrants was first authorized by 13-14 Charles II, ch. 33, § 15 (1662). These warrants, condemned as an "abuse which had crept into the administration of public affairs," Boyd v. United States, 116 U.S. at 625, were issued and used when a seditious libel was known to have been published but the identity of the libeler was not definitely established. Searches would be made of the premises of numerous suspected persons, often founded upon less than suspicion, to discover the identity of the person who had committed the offense so that he might be made to answer for the misdeed. See, e.g., the account of Wilkes v. Wood, 19 Howell State Trials 1153 (1763) in 2 T. May, supra note 22 at 246:

The magistrate, who should have sought proofs of crime, deputed this office to his messengers. Armed with their roving commission, they set forth in quest of unknown
the effect of arbitrarily invading individual privacy and personal security.

In response to one particularly obnoxious use of a general warrant, John Wilkes, a member of the Commons and an outspoken critic of the Crown, who had been arrested pursuant to a general warrant and whose drawers had been ransacked and papers removed, challenged the validity of the general warrants. In pronouncing general warrants illegal, Lord Mansfield explained in another case that "[i]t is not fit, that the judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." In the equally famous case of *Entick v. Carrington*, because the papers seized were not specified in the warrant prior to seizure and because they had not previously been determined by a magistrate to be criminal in nature, the warrant was declared invalid, for, as Lord Camden stated, if the warrant should be said to be legal, "the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." 

Justice Bradley, writing in *Boyd v. United States*, indicated that the statesmen of the colonial period were familiar with the hated writs of assistance and general warrants, and with the decisions of the British courts severely restricting their use. Thus, the fourth amendment was drafted to affirm the right of personal security and privacy against any intrusions upon those interests by government officials. If a search
The circumstances of the eighteenth-century cases in which incipient fourth amendment principles and interests were nurtured acquire an ironical importance from a contemporary perspective. Since the cases involved the search for and seizure of printed pamphlets, the publication of which constituted the criminal offense of seditious libel, both the use of general warrants and the subsequent controls imposed upon them by the English judiciary developed in the context of political offenses—the expression of political opposition to the government. The prosecutions in which the seized papers were destined to be used were attempts by the government to suppress opposition to its policies—a motive similar to the snooping by many government agencies today.

II. The Fourth Amendment and Political Surveillance Updated

While the roots of the fourth amendment are deeply embedded in the use of general warrants to suppress political opposition to the government, the growth and development of the fourth amendment have occurred almost entirely in the context of ordinary criminal offenses having no political ramifications. Yet, while the existing case law of search and seizure has developed almost exclusively in the context of the use

31. A search and seizure had to be authorized by a magistrate, whose duty it was to issue a warrant only after hearing competent evidence—not rumor and gossip—capable of satisfying him that a crime had been committed and that the premises sought to be searched would yield "criminal" items. Furthermore, the manner of execution of the warrant was not to be entrusted solely to the King's messengers, but instead the magistrate was charged with the obligation of setting forth with specificity in the warrant the identity of the items which could be seized and where they could be expected to be found.

32. COOLEY, supra, note 29 at 300.
of surveillance by government agents as a crime control technique—that is, to detect and prevent the commission of criminal offenses—searches and seizures have also been practiced by the government to suppress political opposition.\(^{33}\)

Where no criminal prosecution has been instituted, the possibility of a successful challenge to the use of surveillance brought by the subjects of the surveillance is rendered more difficult than where the government first initiates a prosecution. While the volume of litigation challenging the use of political surveillance has not been great, a few suits have been commenced against the practice.\(^{34}\) In instances where

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33. Political "dissidence" may involve orthodox criminal offenses such as rioting, murder, assault, etc., or offenses of allegiance such as treason, espionage, and sedition, or inchoate offenses. Wherever the line between strictly criminal offenses and strictly political offenses may lie, see note 37 infra, it is clear that surveillance techniques are used against persons who have not committed and who are not even suspected of having committed any criminal offense for the purposes of deterring the exercise of First Amendment rights, or satisfying certain psychological or bureaucratic urges of the persons authorizing and conducting the surveillance and that the use of such techniques for these purposes is illicit:

[The government seems to approach these dissident domestic organizations in the same fashion that it deals with unfriendly foreign powers. The government cannot act in this manner when only domestic political organizations are involved, even if those organizations espouse views which are inconsistent with our present form of government. To do so is to ride roughshod over numerous political freedoms which have long received constitutional protection. The government can, of course, investigate and prosecute criminal violations whenever these organizations, or rather their individual members, step over the line of political theory and general advocacy and commit illegal acts.


Litigation challenging the use of political surveillance has been sparse for several possible reasons. First, the volume of prosecutions in which surveillance has been used for political purposes may be relatively small in comparison with the total number of criminal prosecutions that occur, in part because political surveillance is often conducted with no prosecutorial objective (or only a very remote one) in mind. See United States v. United States District Court, 407 U.S. at 318-19, citing Govt. Brief, pp. 15-16, 23-24 and Govt. Reply Brief, pp. 2-3, and partially because of the infrequency with which it unearths evidence of a criminal violation that could be prosecuted. Id. at 313 n.14 (of 655 conversations intercepted in 1970, 45% were "incriminating"). Second, political surveillance, unlike surveillance in cases of a strictly traditional criminal nature, is often conducted for the bureaucratic purpose of filling dossiers, or for the less benign purpose of satisfying the voyeuristic or paranoid urges of government officials, or with the even more malevolent object of suppressing political dissent by instilling in the dissenters fear of exercising their right of free expression, rather than for the sole legitimate purposes of detection and prevent of crime. See A Nation in Fear, The Progressive, Feb. 1971, at 18, 19-20. Third, because political surveillance so infrequently culminates in a prosecution, there is often difficulty in determining when it has actually occurred. See notes 71 & 74 infra.
there has been police surveillance of a public meeting, suits have been grounded in first amendment theories. Where the challenge has been brought under the fourth amendment, there has been difficulty in convincing courts that the warrant procedure should apply, since persons speaking at public meetings are deemed to have knowingly and intentionally relinquished a claim to privacy. In fact they have usually sought not privacy but publicity, a value which the fourth amendment was not intended to protect.

The problem in mounting a constitutional challenge to political surveillance, if there is one at all, is that of applying rules developed in the realm of criminal surveillance to instances where surveillance is utilized for political purposes. There is certainly no language in the fourth amendment to suggest that the safeguards embodied in its provisions are any less applicable to surveillance conducted for political purposes than to surveillance the objective of which is the prevention or

36. See, e.g., United States v. Tijerina, 412 F.2d 661 (10th Cir. 1969). The court held that admission in evidence of statements made by the defendant at a public meeting to which reporters were admitted did not violate defendant's rights to privacy guaranteed by the Fourth Amendment. "Reliance on the electronic surveillance cases is misplaced . . ." because there was no reasonable expectation of privacy. Id. at 664; see also Katz v. United States, 389 U.S. 347, 351 (1967); United States v. Tropiano, 418 F.2d 1069 (2d Cir. 1969). These issues are probably more properly framed in First Amendment terms. See, e.g., Local 309 v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948); Donnelly, Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs, 60 Yale L. J. 1091, 1128-31 (1951); see also Comment, Chilling Political Expression by Use of Police Intelligence Files: Anderson v. Sills, 5 Harv. Civ. Rts.-Civ. Lib. L. Rev. 71, 85 (1970); but see Anderson v. Sills, 56 N.J. 210, 265 A.2d 678 (1970); Lopez v. United States, 373 U.S. 427, 449-50 (1963) (Brennan, J., dissenting).
37. Very narrowly speaking, the use of surveillance techniques for "political" purposes—that is, "political surveillance"—may be said to occur when government officials place an individual under surveillance in order indirectly or directly to stifle his political beliefs and/or expressions of them. More generally, however, the term "political" is also used as a shorthand phrase to designate the constellation of reasons why surveillance is practiced aside from the detection and prevention of crime, see generally T. Emerson, Toward a General Theory of the First Amendment 60-61, 63-114 (Vintage ed. 1966); T. Emerson, The System of Freedom of Expression 328-36 (Vintage ed. 1970); Emerson, The Federal Bureau of Investigation and the Bill of Rights, 2 Yale Rev. of Law & Soc. Action 169, 176-77 (No. 2, 1971), including the instilling of fear, the satisfaction of paranoid or voyeuristic desires of the government agents, the filling of dossiers for presently unknown, though possibly sinister, future purposes, and for harassment.

Undoubtedly the use of surveillance to detect or prevent crime and its use for political purposes represent two points on the surveillance continuum and may be indistinguishable, or at least overlapping, in some instances. However, the definition of what is and what is not a "political" offense is not within the scope of the present discussion. The formulation of such a definition requires extensive consideration of the meaning of the term "speech" as it is used in the First Amendment. See generally T. Emerson, Toward a General Theory of the First Amendment (1966); T. Emerson, The System of Freedom of Expression (1970); Emerson, Political Trials, 1 Yale Rev. of Law & Soc. Action 6 (Ngs. 2 & 3, 1970).
detection of criminal activity. It should not be forgotten that the great fear of unreasonable searches and seizures held by the Framers grew out of their experience with the hated general warrants of the agents of the British sovereigns, which were more often than not employed for the purpose of suppressing political dissent or for the prosecution of political offenses. Without a judicially issued warrant the eighteenth-century constable who wished to obtain evidence that an individual had expressed disfavored political views was no more entitled to break down that person's door to seize his diary or pamphlets than he was to invade the privacy of a man's home to seize stolen or contraband articles. Likewise, the modern political dissident who uses, for example, a telephone—as well as the traditional means such as meetings, discussions, and publications—to express his political beliefs is at least as deserving of the fourth amendment's protection against unreasonable search and seizure as is one suspected of engaging in criminal activity.\(^{38}\)

Furthermore, when the activity intruded upon is "political" rather than "criminal" in nature,\(^ {39}\) fourth amendment safeguards must be applied with far greater stringency as a result of what Professor Emerson terms the "umbrella effect" of the first amendment.\(^ {40}\) Since the conversation sought to be overheard via the bugged informer is political expression or belief and thus enjoys an unusual degree of protection against governmental interference under the first amendment, the fourth

\(^{38}\) "The Fourth Amendment... was designed not to protect criminals but to protect the privacy and security of all citizens." United States v. White, 401 U.S. at 760 (Douglas J., dissenting). Also, when electronic surveillance is employed, even under the strictest of limitations, the agents conducting it have no way of determining in advance the precise time at which the conversations authorized to be seized will occur. Thus, as a matter of practical necessity they are forced to intercept all conversations in order to obtain the ones "specified" in the warrant. See Osborn v. United States, 384 U.S. 323, 353 (1966) (Douglas J., dissenting); United States v. United States District Court, 407 U.S. at 333 n.14 (Douglas J., concurring); Lopez v. United States, 373 U.S. 427 (1963) (dissenting opinion of Justice Brennan); Blakey, Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis, in The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime 80, 92 (1967). It is no wonder that Justice Douglas has called electronic surveillance "the greatest of all invasions of privacy... [since] it places a government agent in the bedroom, in the business conference, in the social hour, in the lawyer's office—everywhere and anywhere a 'bug' can be placed." Berger v. New York, 388 U.S. 41, 64-65 (1967) (concurring opinion).

\(^{39}\) See notes 21 & 37 supra.

\(^{40}\) Professor Emerson has written that the courts have come to give these constitutional guarantees [of protection against unreasonable search and seizure, privilege against self-incrimination, and due process rules against vagueness and overbreadth in legislation, to cite only the more prominent ones] a substantially different meaning when invoked in behalf of First Amendment rights. Thus the First Amendment has an umbrella effect, drawing within its shelter doctrines from many other areas of the law.

amendment must be applied in a more careful and exacting fashion.\(^4^1\) In effect, a zone of privacy is created by the convergence of these two constitutional provisions, a realm into which the government may not intrude without prior judicial authorization.

In the most recent case involving the search and seizure of political expression, *United States v. United States District Court for the Eastern District of Michigan (Keith)*,\(^4^2\) the Court demonstrated its sensitivity to the first amendment's umbrella effect in a fourth amendment context. In an 8-0 decision it reaffirmed the ancient view that the determination of whether or not to conduct a search and seizure—especially an electronic one in the context of "national security"—is a judicial, not an executive, function and that as a consequence a warrant must be obtained to conduct surveillance which the government describes as involving a domestic threat to national security.

This case grew out of an indictment of persons for conspiracy to destroy government property. Prior to trial the defendants moved to compel the government to disclose information that it was alleged to have obtained as a result of warrantless electronic eavesdropping. The government admitted that it had engaged in electronic surveillance of the defendants but claimed that prior judicial authorization was not required because, since the defendants were suspected of engaging in activities detrimental to national security, the eavesdrops were "lawful . . . as a reasonable exercise of the President's power (exercised through the Attorney General) to protect the national security."\(^4^3^4\) The district court rejected the government's contention, concluded that the surveillance was in violation of the fourth amendment for lack of judicial authorization, and ordered that the evidence be disclosed.\(^4^4\) When the government's petition for a writ of mandamus to set aside the order was denied by the Court of Appeals for the Sixth Circuit,\(^4^5\) the stage was set for review by the Supreme Court.

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\(^4^3\) Professor Emerson states that in cases in which the umbrella effect came into play, the result [did not] turn squarely on a determination that the [governmental action] violated the First Amendment. But . . . First Amendment considerations were an important factor in leading [the Court] to enforce other constitutional safeguards with particular stringency. . . . Thus the First Amendment played a supporting, though not principal, role.


\(^4^5\) United States v. United States District Court for the Eastern District of Michigan, Southern Division, 444 F.2d 651 (6th Cir. 1971).
In broad terms, the Court was confronted by the issue of the power of the President, acting through his designate the Attorney General, to authorize electronic surveillance in “national security” cases without first seeking and obtaining judicial approval.\textsuperscript{46} To state and locate the issue in the context of prior eavesdropping cases,\textsuperscript{47} the Court addressed itself to the “question left open by Katz”:

“Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security . . . .”\textsuperscript{48}

In the forefront of the Court’s framework for the resolution of this issue was the recognition that national security cases . . . often reflect a convergence of First and Fourth Amendment values not present in cases of “ordinary” crime. Though the investigatory duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech.\textsuperscript{49}

The Court first held without merit the government’s reliance on § 2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968\textsuperscript{50}—which provides that nothing in the Act is intended to limit the President’s constitutional power “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”\textsuperscript{51}—in support of its argument that the President may conduct warrantless electronic eavesdrops in national security cases. The Court read § 2511(3) as saying “that if the President has such

\begin{itemize}
\item \textsuperscript{46} 407 U.S. at 299.
\item \textsuperscript{47} In \textit{Olmstead v. United States}, 277 U.S. 438 (1928), Chief Justice Taft speaking for the Court held that because the process of wiretapping had involved no “physical invasion” of a constitutionally protected area, wiretapping could not be said to constitute a search and seizure, and hence no warrant was required to engage in it. Furthermore, since the Fourth Amendment applies by its terms only to tangible objects, even a wiretap involving a physical invasion does not require a warrant because a procedure which does not yield a tangible object is not “unreasonable.” Although the rules pronounced in Olmstead had begun to break down in \textit{Silverman v. United States}, 365 U.S. 505 (1961) (abandoning the physical invasion requirement) and in \textit{Wong Sun v. United States}, 371 U.S. 471 (1963) (dispensing with the tangible objects requirement), it was not formally overruled until the decision in \textit{Katz v. United States}, 389 U.S. 347 (1967). Katz held that non-trespassory electronic surveillance required, to be constitutionally acceptable, the issuance of a warrant by a neutral magistrate since the method of search and seizure violated the defendant’s “reasonable expectation of privacy.” This is the test of Fourth Amendment applicability currently employed by the Court. \textit{But see United States v. White}, 401 U.S. 745 (dissenting opinion of Justice Harlan).
\item \textsuperscript{48} 407 U.S. at 309.
\item \textsuperscript{49} \textit{Id.} at 313.
\item \textsuperscript{50} 18 U.S.C. § 2511(3) (1970).
\item \textsuperscript{51} \textit{Id.}
a power, then its exercise is in no way affected by" the Act.\textsuperscript{52} Congress, in enacting § 2511(3), merely intended to express neutrality on the issue of the constitutional authority of the executive to conduct warrantless searches in instances of suspected domestic subversion,\textsuperscript{53} and it properly entrusted the resolution of the issue to the Supreme Court.

Beginning with the basic postulate that "the Fourth Amendment is not absolute in its terms,"\textsuperscript{54} the Court balanced the competing interests at stake in order to arrive at its determination of whether a new exception to the general Fourth Amendment rule requiring warrants ought to be permitted. While the government had placed strong emphasis in the Court of Appeals on the "inherent" powers of the executive to conduct warrantless electronic surveillances,\textsuperscript{55} it realized the weakness of this position and relied more heavily in the Supreme Court on the contentions (1) that courts lack the competence to evaluate the "'large number of complex and subtle factors'"\textsuperscript{56} involved in deciding whether or not to conduct surveillance activities in national security cases and (2) that disclosure of information to a magistrate in the process of obtaining a warrant "'would create serious potential dangers to the national security and to the lives of informants and agents'"\textsuperscript{57} since

"prior judicial authorization would create a greater 'danger of leaks . . . because in addition to the judge, the clerk, the stenographer and some other official like a law assistant or bailiff who may be apprised of the nature' of the surveillance."\textsuperscript{58}

Though declaring that it did not reject these arguments "lightly," the Court appeared to be predisposed against them, however, since it had stated earlier in its opinion that

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.'"\textsuperscript{59}

Not surprisingly, the argument that the courts are incompetent to evalu-

\textsuperscript{53} 407 U.S. at 308.
\textsuperscript{54} Id. at 314.
\textsuperscript{55} 444 F.2d at 658-61.
\textsuperscript{56} 407 U.S. at 319, quoting Govt. Reply Brief, p. 4.
\textsuperscript{57} Id., quoting Govt. Brief, pp. 24-25.
\textsuperscript{58} Id.
\textsuperscript{59} 407 U.S. at 314.
ate questions of national security was categorically and quickly rejected almost as an insult to the judiciary. The Court devoted slightly more effort to meeting the government’s argument that breaches of confidentiality might pose a danger to life and to national security. However, by stating that the same considerations exist in cases of ordinary criminal offenses but have never posed a significant threat to law enforcement efforts, the Court was equally firm in rejecting this claim. It did not even address the government’s final claim that because national security surveillances “are directed primarily to the collecting and maintaining of intelligence . . . and are not an attempt to gather evidence for specific criminal prosecutions,” no warrant should be required.

It could almost be said that the Court was less than forthright, although through no fault of its own, when it stated that it would apply a balancing test to the resolution of the problem at hand. The pans of the balance were so disproportionately weighted that the “balancing” was illusory. Since the government’s claims were so weak and the competing interest of the defendants’ privacy so strong, the result of striking the balance in favor of the protection of individual privacy was little short of a foregone conclusion.

III. Remedies for the Unauthorized Use of Surveillance

While the imposition of a warrant requirement for the conduct of political surveillance implements the underlying purpose and policy of the fourth amendment—the protection of personal security and privacy against arbitrary invasion from government officials—there is still no assurance that government officials who conduct surveillance activities will satisfactorily comply with the warrant procedure. It is not unlikely that some surveillance activities will continue to be conducted without judicial approval, or possibly that warrants will be obtained illegally

60. "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." Id. at 320.
61. Id. at 321.
62. Id. at 318-19.
63. The basis of this claim implicitly appears to be that the Fourth Amendment comes into play only where there is probable cause to believe that a crime has been or is being committed.
64. See, e.g., the studies of police compliance with the requirements of the Miranda decision which strongly indicate that nearly perfect compliance, while the ideal, is far from the reality. Project, Interrogations in New Haven: The Impact of Miranda, 76 YALE L.J. 1519 (1967); Seeburger & Wettick, Miranda in Pittsburgh—A Statistical Study, 29 U. PITT. L. REV. 1 (1967); Medalie, Leitz & Alexander, Custodial Police Interrogation in Our Nation’s Capital: The Attempt to Implement Miranda, 66 MICH. L. REV. 1347 (1968); see also Griffiths & Ayres, A Postscript to the Miranda Project: Interrogation of Draft Protestors, 77 YALE L. J. 300 (1967).
through fraud, collusion, perjury, or some combination of these evils. Thus, remedies are needed for a demonstrated failure of government officials to obtain a warrant where one is required, remedies to make whole the person whose privacy has been invaded and to act as a deterrent to other unauthorized intrusions.

In cases where a prosecution is eventually commenced, the evidentiary remedies of the *Weeks* and *Mapp* cases\(^{65}\) ought to be adequate to assure that evidence obtained through unwarranted surveillance operations will not be used in the proof of the government’s case. It is likely, though, that many surveillance activities will unearth either insufficient evidence to prosecute or evidence of activities which, while not illegal, are still the subject of official interest. Here the exclusionary rule is of no value to the individual whose privacy has been subjected to an unwarranted intrusion. The traditional remedies of monetary damages and criminal sanctions are available in circumstances such as these.\(^{66}\) However, neither of these remedies has in the past proved to be very successful,\(^{67}\) and both their deterrent and compensatory value are open to question. A statutory right of action\(^{68}\) against the governmental entity that employed the individuals who conducted the illegal surveillance would at least enhance the possibility of compensating the victims of the surveillance by eliminating the problem of the judgment-proof defendant.

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However, it seems that the greater bar to recovery has not been financial insolvency of defendants but a judicial unwillingness to entertain damage actions for violation of civil rights. Finally, injunctive relief is also available to prevent the continuance of illegal governmental surveillance.

The effectiveness of any remedy, whether presently existing or proposed, is severely limited at the outset by the threshold problem of discovering when illegal surveillance has in fact occurred. Because surveillance activities are ordinarily conducted surreptitiously, detection of them usually requires extraordinary diligence, and it is often only fortuitous that their existence comes to light at all. Because the invocation of a remedy against unwarranted, and therefore unconstitutional, surveillance depends in all cases upon the exposure of the existence of surveillance activity, mechanisms for discovering that illegal surveillance has occurred are needed as much as, if not more than, remedies for the surveillance itself.

At present, a limited mechanism exists for the discovery of illegal surveillance. The routine motion for discovery and inspection may reveal the existence of surveillance insofar as it has resulted in and is therefore evidenced by a tangible object such as a tape recording. In some instances, the government may prefer to drop charges rather than reveal the product of the surveillance or indeed the fact that illegal surveillance was even conducted. Unfortunately, this mechanism is only available in cases where a prosecution has been commenced—which probably constitute only a very small proportion of all instances in which electronic surveillance has been employed—and even then it is

69. A statute which requires an individual to disclose information concerning the commission of a crime but which fails to confer immunity from prosecution upon the individual obligated to make the disclosure might run afoul of the constitutional privilege against self-incrimination. See United States v. King, 402 F.2d 694, 697 (9th Cir. 1968). See Ginger & Bell, Police Misconduct Litigation—Plaintiff's Remedies, supra note 67.


71. The prosecution of Daniel Ellsberg and Anthony Russo for the disclosure of classified documents to the press ended in a dismissal of the charges when it was learned that an illegal burglary of the office of the psychiatrist of one of the defendants had tainted the evidence in the case. However, more than a year of pre-trial and trial proceedings during which motions for disclosure and inspection were made elapsed before the existence of the burglary became known and then only as a result of hearings in the seemingly unrelated Watergate investigation. See generally N.Y. Times, Apr. & May, 1973.

72. FED. R. CRIM. P. 16(b).

73. Though the total number of intercepts authorized by state and federal judges pursuant
often difficult to obtain governmental compliance with the motion either as a result of prosecutorial obstinacy or prosecutorial ignorance of the use of illegal surveillance by the investigative apparatus of the government.74

Another method available and, as recent events indicate, robustly operating to unearth illegal surveillance is the free press. Without the investigative activities of reporters and journalists, it is quite possible that the far-reaching magnitude of illegal surveillance during the past few years would never have seen the light of day. However, these same events—most notably the Watergate trials and hearings and the dismissal of criminal charges against Daniel Ellsberg and Anthony Russo for the release of the Pentagon Papers—make clear that additional mechanisms for detecting illegal surveillance are needed and long overdue. The limitation of the free press as a mode of discovery is that it is likely to operate only in the most egregious cases of illegal surveillance, perhaps overlooking the smaller and less sensational cases which, nevertheless, pose no less a threat to the erosion of civil liberties.

Possibly the most effective means for bringing to light the existence of illegal surveillance would be the imposition by statute of an affirmative obligation upon all persons having or obtaining knowledge of the existence of the surveillance to disclose that knowledge to specified prosecutorial or investigative officials. Because illegal surveillance carried on by government agents constitutes not merely a private injury to those whose privacy and personal security are disturbed but a public

74. The difficulty of learning of the existence of illicit electronic surveillance is apparent from the oral argument in Berger v. New York, 35 U.S.L.W. 3361, 3363 (U.S. Apr. 18, 1967). The Chief Justice . . . tried to find out how a person against whom one of these devices has been used gets to know about it in the first place. Mr. Uviller [arguing for respondent New York] said there is no statutory requirement for notice to the defendant in such situations but that there is usually an informal discussion between the prosecuting attorney and defense counsel. He ultimately finds what information was obtained through proceedings on a motion to suppress.

In rebuttal, Mr. Brill [counsel for petitioner] informed the Court that it took considerable digging for him to find out that his client's conversations had been bugged. He insisted that the prosecution did not give him anything.

injury resulting from the undermining of the legitimacy and credibility of the government, the effect of such a disclosure statute would be to satisfy the right of the public to be adequately informed as well as the right of the injured individual to obtain redress for the illegal surveillance. Subjecting to criminal and/or civil prosecution any individual with knowledge of illegal surveillance who fails to disclose such information hopefully would facilitate the injured individual’s invocation of his remedies.

Additionally, there already exist procedures for compelling the disclosure of illegal surveillance. In the case of prosecutors who willfully withhold such information, the contempt power and disbarment proceedings are methods for assisting disclosure. Where disclosure is impeded by the failure of investigative agents to inform prosecutors that the evidence they have provided is tainted by the use of illegal surveillance, the prosecutors might still be subjected to disciplinary action by the court and the bar for failure to exercise reasonable diligence in ascertaining the tainted nature of the government’s evidence. Finally, persons with knowledge of illegal surveillance might presently be subject to a variety of criminal penalties for failure to disclose that information even in the absence of any specific statutory obligation requiring disclosure. An individual possessing information relating to the commission of a crime may be liable to prosecution as an accessory after the fact.

In addition, it is misprision of a felony to conceal knowledge of the commission of a felony, punishable as a misdemeanor. The same conduct in some cases may also constitute obstruction of justice and is subject to more severe penalties.

Needless to say, all of the foregoing procedures for encouraging disclosure of information obtained through illegal surveillance involve the same difficulty of implementation as the remedies for illegal surveillance which the discovery procedures are designed to aid. In order to impose penalties for failing to disclose the fact of illegal surveillance, it must first be known that the surveillance has occurred which, if known in the first instance, would have obviated the need to penalize for failure

77. 18 U.S.C. § 4 (1970). Mere failure to report the commission of a crime is not a misprision. Some affirmative act of concealment is also required. United States v. King, 402 F.2d 694 (9th Cir. 1968); Neal v. United States, 102 F.2d 643 (8th Cir. 1939), cert. denied, 312 U.S. 679 (1940). It is therefore arguable that absent an affirmative statutory obligation to report knowledge of the commission of illegal surveillance there could not be a successful prosecution for misprision of the individual who fails to report.
to disclose. In other words, so long as silence is absolute and completely maintained, it is unlikely that the existence of illegal, surreptitious surveillance will come to light. However, the existence of sanctions for failure to disclose may aid in destroying the conspiracy of silence necessary to maintain secrecy, though possibly to no greater extent than the penalties for conducting the illegal surveillance itself.

**CONCLUSION**

The *United States District Court* case has left the scope of the warrant protection of the fourth amendment considerably clearer and broader. The door left ajar in *Katz* has been firmly fastened shut by the Court leaving only the traditional exceptions to the warrant requirement, which are based upon practical necessity, and the still unfronted question of the power of the executive to conduct warrantless surveillances of foreign agents in national security cases. It is also clear that courts are no less competent to evaluate the appropriateness of a search and seizure in an internal security case than in a case of "ordinary" crime. In fact, judicial scrutiny is all the more essential because of the presence of first amendment considerations. But most significant is the fact that the government's attempt to revitalize the general warrant in the guise of national security has been decisively thwarted. No more will the incantation of the mystical phrase "national security" shield the government from the necessity of obtaining a warrant. Political surveillance, like an orthodox search and seizure, requires the full protection of the fourth amendment, if not a fuller protection bolstered by the first amendment.

The task of implementing the right to be free from government surveillance will in the long run prove to be more difficult than was the task of establishing the right. Even if the extremely difficult barrier to the implementation of remedies for illegal surveillance can be overcome—that is, discovery of the existence of the surveillance—criminal penalties and monetary awards can never truly compensate the individual for the loss of dignity suffered as a consequence of a surreptitious invasion of privacy. And as long as the detection of surveillance faces grave technological and legal obstacles, there may be little effective deterrent to the use of illegal surveillance. In the final analysis, therefore, the application of the warrant requirement to political surveil-

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79. Since this question was not presented in United States v. United States District Court, though its existence and unsettled state were acknowledged, it was specifically left unresolved. 407 U.S. at 308-09 & n.8.
lance—as in all other forms of search and seizure for which it is required—necessitates the same kind of voluntary and good faith compliance by governmental officials with constitutionally sanctioned procedures as do all other instances of the implementation of fundamental rights of the individual. Sadly, the events of recent years and months indicate the paucity of bona fides among our elected officials and their appointed assistants.

80. Of course a warrant issued to conduct political surveillance, regardless of the particular surveillance technique utilized, possesses all the infirmities and limitations for the protection of the privacy of the individual as does a warrant issued in a purely criminal context.

The protections afforded by warrant procedure are (1) a neutral, judicial determination of the existence of probable cause, (2) limitation of the time during, the purposes for, and the circumstances under which it may be used, and (3) a written record of the issuance proceedings. See generally Berger v. New York, 388 U.S. 41 (1967); Title III, Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2516, 2518 (1970); J. SKOLNICK, JUSTICE WITHOUT TRIAL 214-15 (1966); Blakey, supra note 38, at 97.

However, in actual practice many of these so-called protections prove to be illusory as a result of (1) the pro forma issuance of warrants, (2) warrants issued on the basis of hearsay evidence, (3) warrants issued without the disclosure of the identity of informers, and (4) lack of notice to the subject of the search and seizure of its execution. See generally W. LA. FAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 502-03 (Remington ed. 1965); Barret, CRIMINAL JUSTICE: THE PROBLEM IN MASS PRODUCTION IN THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 85 (H.W. Jones ed. 1965); Chevigny, Police Abuses in Connection with the Law of Search and Seizure, 5 CRIM. L. BULL. 3 (1969); Note, Announcement in Police Entries, 80 YALE L. J. 139 (1970).

On balance the warrant requirement of the Fourth Amendment probably provides a greater degree of protection to the political dissident than a warrantless surveillance since the decision as to whether or not the surveillance will be conducted ultimately will be made by an unbiased court rather than by a partisan policeman or prosecutor. Because the distinction between a criminal offense and the expression of dissident beliefs may often be a quite delicate one, it ought to be entrusted to an impartial magistrate, rather than to those engaged in the business of ferreting out crime. See, e.g., the so-called "plot" to kidnap Presidential adviser Henry Kissinger, which may have been no more than idle conversation, frivolous discourse, or philosophical musing. Kifner, The Berrigan Affair: How it Evolved, N.Y. Times, Feb. 21, 1971, at 1, 56, col. 7. At least two lower courts have held that a warrant need not be obtained to conduct a wiretap of "foreign" intelligence. United States v. Brown, ___ F.2d ___ (5th Cir. 1973); Zweibon v. Mitchell, ___ F. Supp. ___ (D.D.C. 1973) ("domestic" activities posing a threat to "foreign" relations).