9-1-1974

Electronic Eavesdropping—Fourth Amendment National Security Cases—The President Need Not Obtain a Warrant to Wire-Tap in National Security Cases—Zweibon v. Mitchell, 363 F. Supp. 936 (D.D.C. 1973).

Linda L. Nathan

ELECTRONIC EAVESDROPPING—FOURTH AMENDMENT NATIONAL SECURITY CASES—THE PRESIDENT NEED NOT OBTAIN A WARRANT TO WIRETAP IN NATIONAL SECURITY CASES—*Zweibon v. Mitchell*, 363 F. Supp. 936 (D.D.C. 1973).

In June, 1972, in the case of *United States v. United States District Court*,[1] the United States Supreme Court held that, under the fourth amendment,[2] the President, via the Attorney General, has no power to authorize the electronic surveillance without prior judicial approval in "domestic" security matters, *i.e.*, matters related to the danger of overthrow of the government by organizations having no significant connection with a foreign power.[3] However, the Supreme Court did not answer the question of whether or not the fourth amendment required the President to obtain a warrant before wiretapping in "national" security

1. 407 U.S. 297 (1972). *USDC* arose from a criminal proceeding in which the United States charged three defendants with conspiracy to destroy government property in violation of 18 U.S.C. § 371 (1970). Defendant Plamondon was charged with the dynamite bombing of the Central Intelligence Agency's office in Ann Arbor, Michigan, in violation of 18 U.S.C. § 1361 (1970), covering destruction of government property. During pretrial proceedings, defendants filed a motion for disclosure of certain electronic surveillance information and for a hearing to determine whether this information "tainted" the evidence which the government intended to offer at trial. In response, the government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which Plamondon had participated and that the Attorney General had approved the wiretaps " 'to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government.' " 407 U.S. at 300 n.2, *quoting* Affidavit of Attorney General. The government contended that the surveillances were lawful, though conducted without prior judicial approval, as a reasonable exercise of the President's power to protect the national security, which power the Government asserted to be " 'the historical power of the sovereign to preserve itself' " or " 'the inherent power of the President to safeguard the security of the nation.' " 444 F.2d 651, 658 (6th Cir. 1971), *quoting* the government's memoranda (emphasis omitted).

The District Court held that the surveillance was in violation of the protections afforded under the fourth amendment, granted the defendant's motion, and ordered the government to disclose the information sought, whereupon the government filed a petition in the Court of Appeals for the Sixth Circuit for a writ of mandamus to set aside the District Court order. That court found the District Court's decision proper and affirmed. *Id.* at 669. The Supreme Court granted certiorari, 403 U.S. 930 (1971), and unanimously upheld the decision of the lower courts.

2. 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.

U.S. CONST. amend. IV.

3. 407 U.S. at 309 n.8.

cases.[4] A year later the United States District Court for the District of Columbia in *Zweibon v. Mitchell*[5] held that the President need not obtain a warrant to conduct electronic surveillance in national security cases.[6] The *Zweibon* court, while purporting to close the question left open in *USDC*, improperly applied the domestic/national security distinction rendered in *USDC*, misinterpreted the Omnibus Crime Control and Safe Streets Act of 1968, and produced a misguided interpretation of the fourth amendment.

Zweibon arose when the government admitted in open court in the consolidated cases of *United States v. Beiber*[7] and *United States v. Joffe*,[8] that conversations of certain defendants, all members of the Jewish Defense League (JDL), had been overheard during electronic surveillance conducted without a warrant.[9] Defendants brought an action under section 2520 of the Omnibus Crime Control and Safe Streets Act of 1968[10] for damages resulting from alleged unlawful electronic surveillance during October, 1970 and from January 5, 1971 through June 30, 1971.[11]

The Federal Bureau of Investigation initially requested authority from the Attorney General to conduct the surveillance in September, 1970 on the ground that threatened JDL demonstrations would make security for foreign dignitaries attending the United Nations session more difficult and could cause "international embarrassment to this country" if not curbed with the assistance of electronic surveillance.[12]

In January, 1971, a second application and authorization followed

4. *Id.* at 308.

5. 363 F. Supp. 936 (D.D.C. 1973).

6. *Id.* at 943-44. *See also* United States v. Meulener, 351 F. Supp. 1284, 1287 n.* (C.D. Cal. 1972) (infers that *USDC* allowed warrantless electronic surveillance authorized by the Attorney General in cases of foreign espionage).

7. 71 CR 479 (E.D.N.Y. July 6, 1971).

8. 71 CR 480 (E.D.N.Y. July 6, 1971).

9. 363 F. Supp. at 938.

10. 18 U.S.C. § 2520 (1970) provides:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—
>
> (a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher;
>
> (b) punitive damages; and
>
> (c) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> A good faith reliance on a court order or legislative authorization shall constitute a complete defense to any civil or criminal action brought under this chapter or under any other law.

11. 363 F. Supp. at 938.

12. *Id.*

demonstrations against Soviet diplomats and official Soviet government protests.[13] Subsequent authorizations were granted on the basis of the successful wiretaps which resulted in FBI infiltration and prevention of the JDL's embarrassing activities, as well as on the basis of continuing Soviet protests, threats that private citizens in Moscow would retaliate in kind against Americans, and news of actual retaliation.[14] The Attorney General determined that the JDL activities were "detrimental to the continued peaceful relations between the United States and the Soviet Union and threatened the President's ability and constitutional authority to conduct the foreign relations of this country."[15]

The district court concluded that, on the basis of *USDC*, the Omnibus Crime Control and Safe Streets Act did not apply to "national" security surveillances and that "it is the executive and not the judiciary, which should determine whether or not an electronic surveillance requires prior judicial authorization."[16]

Both *Zweibon* and *USDC* are cases which involve the application of section 2511(3) of Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[17] It provides:

> Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, 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]

The *USDC* Court advanced two significant interpretations of section 2511(3), both relevant to *Zweibon*. Initially, the Court stated

13. *Id.* at 938-39.
14. *Id.* at 939.
15. *Id.* at 942.
16. *Id.* at 942-43.
17. 18 U.S.C. §§ 2510-20, 2511(3) (1970).
18. *Id.* § 2511(3).

that "nothing in section 2511(3) was intended to expand or to contract or to define whatever presidential surveillance powers existed."[19] The section was merely an expression of neutrality, not a basis for executive authority to wiretap.[20] Since section 2511(3) was merely

19. 407 U.S. at 308 (emphasis omitted).

20. *Id.* In *USDC*, the Court recognized that the President has the fundamental duty under Article II, section 1 "to preserve, protect, and defend the Constitution of the United States." 407 U.S. at 310. Implicit in that duty, according to the Court, is the power to protect the Government against subversion or overthrow by unlawful means, and to carry out this duty if necessary by electronic surveillance. *Id.* The Court failed, however, to provide any authority for finding that Article II, section 1, clause 7 conferred any substantive powers on the President. Rather, it might seem appropriate to interpret the oath of office clause as a requirement that the President promise to do his job lawfully. In fact, the Supreme Court in *USDC* for the first time in Constitutional history had used the presidential oath of office clause to confer substantive power. In the past, courts have often ignored the question of the executive's power to conduct electronic surveillance. *See, e.g.*, Alderman v. United States, 394 U.S.165, 170 n.3 (1968), *rehearing denied*, 394 U.S. 939 (1969). Other courts have merely chosen to assume that the executive had the power without regard to its origin. *See, e.g.*, United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971).

Justice Powell justified presidential use of electronic surveillance because it had been sanctioned by previous administrations since 1946. 407 U.S. at 310. However, past usage of a power, especially only intermittently (*see id.* at 310 n.10), is no justification at all; the fact that unconstitutional powers have been used in the past does not thereby establish justification. *See* Mottola v. Nixon, 318 F. Supp. 538, 541-42 (N.D. Cal. 1970), *rev'd on other grounds*, 464 F.2d 178 (9th Cir. 1972). Justice Powell also stated that unless the "[g]overnment safeguards its own capacity to function and preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered." 407 U.S. at 312. To eschew the use of electronic surveillance, maintained Justice Powell, would be contrary to the public interest in view of conspirators' increased usage of telephones in the planning of their crimes. *Id.* at 311. *Zweibon's* holding that the President has power to wiretap was based upon his duty to protect the national security (as in *USDC*) and upon his power to "conduct . . . foreign relations." 363 F. Supp. at 942. But "the fact that power exists in the Government does not vest it in the President." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 604 (1952) (Frankfurter, J., concurring). Congress might better have made this determination (*id.* at 629 (Douglas, J., concurring)), and, in fact, appeared to have done so in the Omnibus Crime Control and Safe Streets Act of 1968. *See* note 10 *supra.*

USDC found the substantive power of the President to wiretap in the Oath of Office Clause; that is, based on his duty to preserve, protect, and defend the Constitution. This power, coupled with the *Curtiss-Wright* holding that the President is the sole organ of the federal government in foreign affairs, 299 U.S. 304, 320 (1936), lays a basis for the argument that he need not obtain a warrant when national as opposed to domestic security may be involved. In other words, when national security wiretaps are being considered, the President, without the judiciary or Congress, has the sole authority to determine whether the warrantless surveillance is reasonable under the fourth amendment. *Zweibon* alluded to this reasoning when it concluded:

> Under the facts of this case, which show a clear threat to this country's foreign relations, it is the executive and not the judiciary, which should determine whether or not an electronic surveillance requires prior judicial authorization.
>
> . . . .

a disclaimer, its constitutionality was not in question in either *USDC*[21] or *Zweibon*.[22] The issue was not whether the statute constitutionally conferred authority upon the President to authorize warrantless wiretaps. Since the statute conferred no power, the issue was whether the office of the President had independently acquired this power without running afoul of the fourth amendment.

Secondly, the *USDC* Court distinguished between cases of "national" security and those of "domestic" security. The term "national" security was applied to the activities of foreign powers because it was used by Congress only in the first sentence of section 2511(3) having reference to danger from foreign powers.[23] The Court stated that *USDC* involved criminal charges of conspiracy to destroy, and destruction of, government property, thereby falling within the second sentence of section 2511(3) which concerns danger from "domestic" organizations.[24] It limited its holding requiring prior judicial approval for wiretaps authorized by the President to "domestic" security matters[25] and defined a domestic organization as a "group or organization (whether formally or informally constituted) composed of citizens of the United States and which has no significant connection with a foreign power, its agents or agencies."[26]

Extrapolating from the *USDC* Court's statutory interpretation, a two step approach should be applied when deciding a case involving presidentially authorized wiretapping. Initially, it should be determined if the activity under surveillance is embraced by the language of section 2511(3). If it is not the kind of activity covered by the language of section 2511(3), clearly the Act itself would require a warrant.[27] Secondly, even if the *activity* were embraced within the

---

The electronic surveillances were installed in this case under the constitutional authority of the President over the conduct of foreign relations and his inherent power to protect our national security.

363 F. Supp. at 943. However, the Court would do well to remember that, "like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution." 299 U.S. at 320. According to its own reasoning, the fourth amendment contemplates a judicial determination. 407 U.S. at 316-17. In addition, there will be no protection against executive abuse where the President alone or the Attorney General alone (as was the case in *Zweibon*, 363 F. Supp. at 942) makes the decision to wiretap. 407 U.S. at 317.

21. 407 U.S. at 308.
22. 363 F. Supp. at 942.
23. 407 U.S. at 309 n.8.
24. *Id.*
25. *Id.* at 324.
26. *Id.* at 309 n.8.
27. If the surveillance under consideration does not fall within section 2511(3), then

scope of section 2511(3), the court must determine whether the President is *constitutionally* empowered to authorize warrantless surveillance

---

the Act applies and there would be no reason to consider the constitutional issues. This was the contention of Justice White in his concurring opinion in *USDC*, and it is significant because a lesser showing of probable cause may be required under the fourth amendment than under the Act. 407 U.S. at 338.

Justice White argued that the limitation of the applicability of section 2511(1) is confined to those situations which section 2511(3) specifically describes. 407 U.S. at 338. Therefore, if the facts of a given case do not fall within the provisions of section 2511 (3), the interception is illegal without prior judicial approval, regardless of whether or not the President otherwise would have the constitutional power to authorize it. *Id.* at 338 n.2. In *USDC*, Justice White found that the activities of the defendants, *i.e.*, conspiring to destroy government property, did not fall within the first sentence of section 2511(3) because it lacked any connection with a foreign power (*id.* at 340-41), nor under the second sentence because the government failed to show that it was necessary to prevent the overthrow of the government by unlawful means or that there was "any other clear and present danger to the structure of the Government." *Id.* at 341. In other words, Justice White construed the exceptions to the Act very strictly while the majority used a broader construction denoting "domestic" and "national" security cases which include subversion as exceptions.

Justice White concluded that because there was no determination of the existence of a clear and present danger, the interception was contrary to the provisions of the statute and, therefore, subject to exclusion from evidence at any trial under section 2515 as the fruits of the warrantless electronic surveillance. *Id.* at 344.

The same argument can be applied to *Zweibon*. The sole assertion in *USDC* was that the monitoring at issue was employed to gather intelligence information "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government." *Id.* at 335. The assertion in *Zweibon* was that surveillance was employed to protect foreign relations. 363 F. Supp. at 939-40. There was no judgment by the Government in either case that the surveillance was necessary to prevent overthrow by force or other unlawful means or that there was any clear and present danger to the structure or existence of the Government. 407 U.S. at 340-41; 363 F. Supp. at 939.

This raises the question as to what constitutes a "clear and present danger." Arguably, the majority in *USDC* may have concluded that the destruction of government property does present a clear and present danger to the structure of the government because of the disruptive effect it may have. Likewise, in *Zweibon* it is arguable that disruption of foreign affairs by a domestic organization also threatens the structure of our government insofar as national confidence is concerned. Yet, in neither case were these arguments advanced.

In fact, both of these activities may be classified as "subversive," and legislative intent indicates that subversive activities are to be governed by the Act (114 *Cong. Rec.* 14,702-03 (1968) (remarks of Senator McClellan)), and, therefore, subversive activities alone should not consitute a clear and present danger.

Senator Fong suggested that Title III be amended to apply only to organized crime and to require a showing of a connection with organized crime before a warrant is issued. *Id.* at 14,702. But Senator McClellan indicated that Title III was meant to apply to subversive activities as well:

> The main thrust of title III is directed at organized crime, subversive activities, and other serious crimes. Each of the crimes contained in title III for which an electronic surveillance or order [*sic*] may be obtained has been selected because it is either serious in itself or characteristic of organized crime or subversives.

of the activity, for section 2511(3) excludes only *constitutional* exercises of presidential power from the scope of Title III.[28] The sentence of the section into which the case falls—the first or the second—determines whether the case involves "national" or "domestic" security mat-

---

. *Id.*

In addition, he stated that the act was to allow the President to use his discretion to act under the court order system with respect to the security of the government. *Id.* at 14,703. The amendment suggested by Senator Fong was rejected. *Id.* at 14,705.

Title III itself contains further confirmation in section 2516 of legislative intent to include subversive activities within its scope. Section 2516 lists among the crimes covered, espionage, sabotage, and treason—crimes which involve either "national" or "domestic" security. The statutes relating to espionage (18 U.S.C. §§ 792-99 (1948)), cover any person who

> for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation . . . , obtains information . . . [from any] place connected with the national defense.

Id. § 793(a). It also applies to anyone who copies (*id.* § 793(b)), receives (*id.* § 793(c)) or delivers (*id.* § 793(d) & (e)) such information. Foreign agents and citizens of the United States have been prosecuted under this statute. *See, e.g.*, United States v. Melekh, 190 F. Supp. 67 (S.D.N.Y. 1960). Espionage also includes communication of national defense material to a foreign government (18 U.S.C. § 794 (1970)) which is defined as

> any faction, party, department, agency, bureau, or military force of or within a foreign country, or for or on behalf of any government or any person or persons purporting to act as a government within a foreign country.

Id. § 798(b). The statutes relating to sabotage (*id.* §§ 2151-57 (1970)) cover any person who, "when the United States is at war or in times of national emergency" (*id.* §§ 215(a), 2154(a)), intentionally interferes with or obstructs the war effort or the national defense (*id.* §§ 2155-56). Treason (*id.* §§ 2381-91) covers any person who, "owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere." *Id.* § 2381. The broad coverage of these statutes, which were specifically included in the Omnibus Crime Control and Safe Streets Act of 1968 in spite of section 2511(3), lends heavy support to demonstrate congressional intent to require a special determination by the President, subject to judicial review, that a clear and present danger exists before the President exercises any powers he may have outside the Act. Justice White, however, believed Congress gave responsibility for determining whether or not there is a clear and present danger to the President, not the judiciary. 407 U.S. at 343. If such a requirement is not necessary, it is difficult to perceive a situation where electronic surveillance concerning these crimes would be subject to the warrant requirement under the Act; they invariably involve either "national" or "domestic" security. It is unlikely Congress would render section 2516 of the Act meaningless.

The activities charged in *USDC* and *Zweibon* do not directly fall within any of these definitions. If anything, they seem less of a danger to the structure of the government than the statutory subversive activities and thus would not appear to present a clear and present danger within the meaning of section 2511(3).

What constitutes a clear and present danger remains a mystery. But, one must recognize the merit of Justice White's argument that, since the government failed to articulate any basis for clear and present danger to the existence or structure of the government (*id.* at 341), the wiretap was illegal under the statute and there was no reason to reach the Constitutional question. *Id.* at 344.

ters, respectively. If it is a "domestic" security issue, *USDC* governs and prior judicial approval is required before a presidentially authorized wiretap may be implemented. If, however, it involves a matter of "national" security under section 2511(3), the court, in a case of first impression, must balance the governmental interest, *i.e.*, the necessity of having the President unilaterally approve wiretaps in "national" security matters, against the invasion of the individual's privacy protected by the fourth amendment, as did the court in *USDC* regarding "domestic" security matters. The *Zweibon* court failed at both steps.

The *Zweibon* court considered the electronic surveillances conducted against the JDL to be in the nature of "national" security surveillances and, therefore, within the disclaimer provisions of section 2511(3).[29] Yet, nothing in that section suggests that the exclusion from the Act's protection is proper to prevent *embarrassment* in foreign relations. In the FBI memorandum requesting the initial surveillance, the government put forth no proof that the nation was endangered by "an actual or potential attack or other hostile acts of a foreign power" or that it needed "to obtain foreign intelligence information deemed essential to the security of the United States or to protect national security information."[30] The Director of the FBI merely cited past JDL behavior, security of foreign dignitaries at the United Nations, and prevention of embarrassment to the United States as justification.[31]

The only facts which conceivably might have brought the government's actions within the ambit of national security were the reports of retaliation against United States citizens in Moscow, and this reason was given *after* previous surveillance had been conducted.[32] To use this as a reason to justify classifying this case as a national security case would mean that any time a United States citizen demonstrates (legally or illegally) against foreign policy regarding a certain country, and that country retaliates against Americans living or visiting there, the United States government may then use warrantless electronic surveillance in the name of protecting national security. Not only does this

28. Section 2511(3) states:

> Nothing contained in this chapter . . . shall limit the *constitutional* power of the President . . . .

18 U.S.C. § 2511(3) (1970) (emphasis added). Therefore, if the President exercised his power unconstitutionally, his actions would remain subject to Title III proscriptions —specifically to section 2520 which provides for recovery of damages.

29. 363 F. Supp. at 942-43.

30. *Id.* at 938-39.

31. *Id.* at 938.

32. *Id.* at 941.

allow a foreign power to control Americans' civil rights by preventing them from demonstrating without fear of government eavesdropping, but it gives the executive branch the power to chill unwanted criticism of its foreign policy.

In addition, the *Zweibon* court failed to require a proper showing of the JDL's connection with a foreign power. The only "connection with a foreign power" mentioned in the case is the activities of the JDL directed *against* the Soviet government, while the context of *USDC*'s definition suggests that the Court meant that the organization be somehow working with the foreign power. Therefore, the JDL in *Zweibon* should have been considered a domestic organization under *USDC* since it had "no significant connection with a foreign power, its agents or agencies."[33] But even if the facts did involve "national security" matters, the court should have proceeded to a constitutional analysis of the competing interests. Indeed, the *USDC* decision fairly presented those factors which should have guided the *Zweibon* court.

Before requiring the executive to obtain a warrant prior to conducting domestic security surveillance, the *USDC* Court examined and balanced the basic values at stake in the case—the duty of the government to protect the domestic security and the potential danger posed by unreasonable surveillance to individual privacy and free expression.[34] The Court had to determine whether the needs of citizens for privacy and free expression are better protected by requiring a warrant beforehand and whether the government could still successfully

33. Despite the fact that the JDL can be labeled a "domestic" organization under *USDC*, it is arguable that the surveillance under consideration is not directed at the type of activity covered by the second sentence of section 2511(3). As in *USDC*, where destruction of government property was held to be within the second sentence, exempting wiretaps for the protection "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 activities of the JDL would likewise fall under section 2511(3). See note 27 *supra* for an argument that *Zweibon* did not fall within the provisions of section 2511(3) and thus should have been decided under the Act.

34. 407 U.S. at 314-15. The balancing test is not new. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 533 (1967), and Wyman v. James, 400 U.S. 309, 318-24 (1971). *See generally*, Becker, *The Supreme Court's Recent "National Security" Decisions: Which Interests are being Protected?*, 40 TENN. L. REV. 1 (1972).

The balancing test has been cogently criticized:

> If the arguments employed to justify balancing are carried to their logical conclusion, then the Constitution does not contain—and is not even capable of containing—anything whatever which is unconditionally obligatory . . . . Anything which the Constitution says *cannot* be done *can* be done, if Congress thinks and the Court agrees . . . that the interests thereby served outweighed those which were sacrificed.

Frantz, *The First Amendment in Balance*, 71 YALE L.J. 1424, 1445 (1962).

protect itself from subversion and overthrow.[35]

In weighing these competing interests, the *USDC* Court considered three contentions by the government. Initially, the government urged the adoption of an exception to the warrant requirement in domestic security situations because a requirement of prior judicial review "would obstruct the President in the discharge of his constitutional duty to protect domestic security."[36] Secondly, it argued that courts lack both the knowledge and techniques necessary to determine if probable cause exists to believe that surveillance is necessary to protect national security.[37] Finally, it contended that disclosure of information to a magistrate " 'would create serious potential dangers to the national security and to the lives of informants and agents . . . .' "[38]

The *USDC* majority rejected each of these arguments and stated that the reasonableness[39] and probable cause[40] requirements of the fourth amendment require a judicial determination if fourth amendment freedoms are to be guaranteed.[41] The Court feared that the executive branch could not remain disinterested enough to protect rights of privacy and speech when the pressure to enforce the laws and obtain incriminating evidence became great.[42] Justice Powell, for the Court, asserted that individual freedoms are best preserved when the separation of powers and division of functions are observed.[43]

Applying this test to *Zweibon*, the values that should have been balanced are the duty of the President to successfully conduct foreign relations and the potential danger to individual privacy and free expression posed by unreasonable surveillance. The determination which should have been made is whether the needs of citizens for privacy and free expression are better protected by requiring a warrant beforehand and whether the government could still successfully conduct America's foreign policy.

The *Zweibon* decision lacks the meticulous balancing process which pervades the *USDC* opinion. Instead, the *Zweibon* opinion is primarily devoted to the argument that it is within the President's constitutional power to authorize electronic surveillance in matters of for-

35. 407 U.S. at 315.
36. *Id.* at 318.
37. *Id.* at 319.
38. *Id.* (citation omitted).
39. *Id.* at 315.
40. *Id.* at 316.
41. *Id.* at 316-17.
42. *Id.* at 317.
43. *Id.*

eign affairs and national security,[44] an argument that few legal scholars would oppose. In confronting the *real* question at hand, whether or not the exercise of this power without judicial approval contravenes fourth amendment standards, the court was satisfied with this cryptic statement: "Based on the facts of this case the surveillances, without prior judicial authorization, were reasonable within the meaning of the Fourth Amendment and were therefore lawful."[45] It may well be that in analyzing the competing interests at stake a reason exists which could support the *Zweibon* conclusion, thus supporting a different treatment for "national" security matters and for "domestic" security matters. In light of the arguments advanced by the government and rejected in *USDC*, however, it is difficult to visualize a rationale for such a distinction. At the very least, before being discarded, the rights of individuals under the fourth amendment deserve more than a one sentence statement of legal conclusion.

The Court in *USDC* attempted to clarify the warrant requirement under the Omnibus Crime Control and Safe Streets Act of 1968 by distinguishing between "national" and "domestic" security cases under section 2511(3). Once having established the labels, it held that domestic security was not a government interest which would justify warrantless electronic surveillance. It failed to demonstrate how the activities of the "domestic organization" constituted a clear and present danger to the structure of the government thus bringing them within section 2511(3).[46] In so doing, the Court exposed section 2511(3) to potential abuse. Relying on *USDC*, courts are likely to evaluate the facts of a given case, label it as a "domestic" or "national" surveillance matter, and then conclude that because a label applies it falls within section 2511(3). The labels delineated in *USDC*, however, should not become a substitute for the language of the Act, for clearly there are instances which may involve domestic organizations which still should be governed by the Act. In addition, there are instances which may involve foreign governments which may not fall directly under the language of the first sentence of section 2511(3). It is the *activity* of the group which places it within section 2511(3); the complexion of the group only distinguishes the sentence which potentially applies.

The *USDC* Court recognized that difficulties may result in applying the distinction in certain circumstances.[47] The Court could not

44. 363 F. Supp. at 942-44.
45. *Id.* at 944.
46. See note 27 *supra*.
47. The Court stated:

have anticipated, however, that the distinction would result in an application as erroneous as that in *Zweibon*. *Zweibon* in essence said that the JDL activities were a "national" surveillance matter because they involved foreign affairs and that *USDC* was distinguishable as a "domestic" surveillance case. Thus no warrant was required under the fourth amendment. *USDC* neither stood for the proposition that all foreign affairs matters fall under the "national" security section of section 2511(3) nor that only "domestic" security matters required a warrant. But *USDC* obscured its own interpretation of section 2511(3) by failing to demonstrate the precise language it relied on and how it applied to the facts at hand. *Zweibon v. Mitchell* not only compounded that obscurity, but also judicially sanctioned executive rewriting of the fourth amendment.

Linda L. Nathan

No doubt there are cases where it will be difficult to distinguish between 'domestic' and 'foreign' unlawful activities . . . where there is collaboration in varying degrees between domestic groups or organizations and agents or agencies of foreign powers . . . .

407 U.S. at 309 n.8.