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AUTHORITY FOR WARRANTLESS NATIONAL SECURITY SEARCHES

Presidents have long asserted the constitutional authority to order searches, even without judicial warrants, where necessary to protect the national security against foreign powers and their agents. The courts have repeatedly upheld the exercise of this authority.

A memorandum from President Franklin D. Roosevelt to Attorney General Robert H. Jackson, dated May 21, 1940, authorized the use of wiretaps in matters "involving the defense of the nation." *See United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 311 n.10 (1972) (*"Keith"*). The President directed the Attorney General "to secure information by listening devices [directed at] the conversation or other communications of persons suspected of subversive activities against the government of the United States, including suspected spies," while asking the Attorney General "to limit these investigations so conducted to a minimum and to limit them insofar as possible as to aliens." *See* Electronic Surveillance Within the United States for Foreign Intelligence Purposes: Hearings Before the Subcomm. on Intelligence and the Rights of Americans of the Select Comm. on Intelligence, 94th Cong., 2d Sess. 24 (1976) (statement of Attorney General Edward H. Levi) ("Levi Statement"). President Roosevelt issued the memorandum after the House of Representatives passed a joint resolution to sanction wiretapping by the FBI for national security purposes, but the Senate failed to act. *See* Americo R. Cinquegrana, *The Walls and Wires Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978*, 137 U. Pa. L. Rev. 793, 797-98 (1989).

By a letter dated July 17, 1946, Attorney General Tom C. Clark reminded President Truman of the 1940 directive, which had been followed by Attorneys General Jackson and Francis Biddle. At Attorney General Clark's request, the President approved the continuation of the authority, *see* Levi Statement at 24, and even broadened it to reach "internal security cases." *Keith*, 407 U.S. at 311 and n.10. In the Eisenhower Administration, Attorney General Herbert Brownell, as the Supreme Court noted in *Keith*, advocated the use electronic surveillance both in internal and international security matters. 407 U.S. at 311.

In 1965, President Johnson announced a policy under which warrantless wiretaps would be limited to national security matters. Levi Statement at 26. Attorney General Katzenbach then wrote that he saw "no need to curtail any such activities in the national security field." *Id.* Attorney General Richardson stated in 1973 that, to approve a warrantless surveillance, he would need to be convinced that it was necessary "(1) to protect the nation against actual or potential attack or other hostile acts of a foreign power, (2) to obtain foreign intelligence information deemed essential to the security of the United States, or (3) to protect national security information against foreign intelligence activities." *Id.* at 27. When Attorney General Levi testified in 1976, he gave a similar list, adding that a warrantless surveillance could also be used "to obtain information certified as necessary for the conduct of foreign

affairs matters important to the national security of the United States." *Id.*

Warrantless electronic surveillance of agents of foreign powers thus continued until the passage in 1978 of the Foreign Intelligence Surveillance Act, 18 U.S.C. §§ 1801-29. Although the Supreme Court never ruled on the legality of warrantless searches as to agents of foreign powers, *see Keith*, 407 U.S. at 321-22 (requiring a warrant in domestic security cases but reserving issue where a foreign power or its agents were involved), the courts of appeals repeatedly sustained the lawfulness of such searches. *United States v. Truong Dinh Hung*, 629 F.2d 908, 914 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973); *United States v. Butenko*, 494 F.2d 593, 606 (3d Cir. 1974); *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971); *but see Zweibon v. Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (dictum in plurality opinion). The Fourth Circuit held, for example, that "because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance." *Truong*, 629 F.2d at 914. As the court elaborated, "attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy," and a "warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations." *Id.* at 913 (citations and footnote omitted). Furthermore, "the executive possesses unparalleled expertise to make the decisions whether to conduct foreign intelligence surveillance." *Id.* (citations omitted). And "[p]erhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs." *Id.* at 914 (citations omitted). In this pre-statutory context, two courts of appeals, the Fourth Circuit in *Truong* (*id.* at 915) and the Third Circuit in *Butenko* (494 F.2d at 606), would have limited the authority to instances where the primary purpose of the search was to obtain foreign intelligence."

The passage of FISA created an effective means for issuance of judicial orders for electronic surveillance in national security matters. Congress, however, had not given the Foreign Intelligence Surveillance Court the power to issue orders for physical searches. After nevertheless granting orders in three instances during the Carter Administration, the court ruled early in the Reagan Administration, as the Justice Department then argued, that it lacked jurisdiction to approve physical searches. *See* S. Rep. 103-296, at 36-37 (1994). Thus, physical searches after the ruling had to approved by the Attorney General without a judicial warrant. *Id.* at 37. In 1994, after the use of warrantless physical searches in the Aldrich Ames case, Congress concluded that "from the standpoint of protecting the constitutional rights of Americans, from the standpoint of bringing greater legal certainty to this area, from the standpoint of avoiding problems with future espionage prosecutions, and from the standpoint of protecting federal officers and employees from potential civil liability," *id.*, FISA should be amended to cover physical searches. *Id.* at 40.