Gaylord Nelson p or 3/12/74

'National Security' Taps

Civil rights leader Martin Luther King, Jr., newspaper columnist Joseph Kraft, former Nixon presidential aides William Safire and John Sears, former National Security Council staff members Morton Halperin and Anthony Lake, former congressional aide Dunn Gifford, and boxer Muhammed Ali—these citizens have something in common. Their telephone conversations have been wiretapped by the federal government for so-called "national security" reasons. And they are merely a handful among thousands.

In each case the government acted without obtaining a judicial warrant approving of the "tap." The government therefore did not explain to a court the justification for the surveillances. Nor did the government voluntarily inform any of the individuals involved that their telephone conversations had been secretly intercepted. Most of those tapped never learn about it.

Despite the righteous indignation of congressional representatives, lawyers, and the public, warrantless wiretapping continues. Last January the Justice Department reported that in one week it had authorized three warrantless wiretaps in national security cases—an average week's quota according to the department. The department did not indicate whether the taps included surveillances of American citizens. Nor did the department indicate the basis for believing the taps necessary. And that is precisely the problem.

Warrantless wiretaps give the government an unreviewed and unchecked power to invade a citizen's privacy. The government alone determines whom it should tap and when it should tap. Neither a court, nor the Congress, nor the individual involved has an opportunity to demonstrate that there is no justification for the tap.

Because they escape scrutiny by anyone outside government, warrantless wiretaps are a dangerous and fundamental assault on the individual's right to privacy and other civil liberties. They pose a threat to the freedom of every citizen, regardless of his or her station in life. In a 1928 surveillance case Supreme Court Justice Oliver Wendell Holmes called warrantless wiretaps "dirty business." In 1931, J. Edgar Hoover—who by then had been FBI director for seven years—called them "unethical" (his position softened in later years).

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Warrantless taps also are, in my view, unconstitutional. The Fourth Amendment explicitly provides that every citizen should be free from government searches and seizures that are not authorized by a judicial warrant. There is no exception for "national security" cases. The basic notion underlying the amendment is that a neutral court—not a government blinded by its lawful investigatory responsibilities—should decide whether any search contemplated by the government is reasonable.

In the 1967 *Katz* and *Berger* decisions, the Supreme Court held that the Fourth Amendment's protections apply to government wiretapping. The Court also held in the 1972 *Keith* case that the government could not wiretap American citizens without a judicial warrant even when the citizen's activities threaten "domestic security." The Court reserved judgment, however, for those cases in which American citizens have a "significant connection" with foreign powers and their agents.

Because the Court has not yet decided this latter question, the present administration maintains that the government can, without a warrant, tap American citizens and others whose activities involve foreign affairs. It was on this basis that the Justice Department authorized three warrantless wiretaps last January.

The writer, a Democrat, is a United States senator from Wisconsin.

Congress should not tolerate the continued use of these warrantless wiretaps for so-called "national security" purposes. It is indeed ironic for the government to invoke "national security" to violate those constitutional rights and liberties which the government is obligated to defend. Any remedial legislation should include at least four basic elements.

First, before the government could wiretap American citizens for national security purposes, it should have to obtain a judicial warrant based on proba-

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ble cause that a crime had been or was about to be committed. This provision would simply recognize the rights guaranteed to every citizen by the Fourth Amendment.

Second, before the government could wiretap foreign powers (i.e., embassies) or their agents, it should have to obtain a judicial warrant based on a belief that the surveillance is necessary to protect national security. The warrant standards for foreign power taps should thus be less rigorous than those applied to American citizens.

The justification for this second provision is plain. The government's desire to wiretap should be reviewed by a court. There should be no exceptions. Otherwise the exceptions could be stretched to sanction an unreasonable invasion of an American citizen's privacy. This second warrant requirement would in no way undermine the government's ability to protect against foreign attack or subversion; the government would be able to wiretap foreign powers and their agents any time there is a real need.

Third, every American citizen wiretapped should be informed of the surveillance within 30 days after the last authorized interception. This would afford the individual an opportunity to protect against violations of his constitutional rights. The disclosure of the wiretap should be postponed, however, if the government satisfies the court that the person wiretapped is engaged in a continuing criminal enterprise or that disclosure would endanger national security interests.

Fourth, there should be continuing congressional oversight of wiretaps and other surveillance activities engaged in by the government. At least once a year, representatives of the government should testify, under oath, before a joint congressional committee about their surveillance activities. In this way, Congress can determine whether the government is complying fully with the laws and whether additional legislation is needed to protect individual privacy.

A number of Senators have joined me in introducing two bills (S. 2820 and S. 2738) which incorporate these basic elements. Other bills might be able to improve on these measures. But in any event, the need for congressional action is clear. A citizen's constitutional right to privacy should not exist at the sufferance of some government official's definition of "national security."