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National Security Wiretaps

THE SENATE JUDICIARY COMMITTEE is about to take up a very important bill to regulate electronic surveillance in foreign intelligence cases, the acutely sensitive national-security area which has never been subjected to statutory controls. The measure is the product of long negotiations involving Attorney General Edward H. Levi and committee members spanning the political spectrum. It thus reflects both bipartisan senatorial cooperation and the administration's refreshing hospitality to congressional involvement in a field in which the executive branch has asserted great autonomy in the past.

The bill's greatest value is that it would impose executive accountability and judicial review on all foreign-intelligence wiretapping and bugging in the United States. Requests for warrants would have to be signed by top officials who would be unable to duck responsibility if they sought improper taps. Designated federal judges could issue warrants only if the government properly certified the need and the judge found probable cause to believe that the target of the tap is an agent of a foreign power (or a knowing accomplice) and is engaged in sabotage, terrorism or "clandestine intelligence activities."

These are strict standards. Even so, the American Civil Liberties Union and others are seriously concerned that some provisions might lead to excessive wiretapping and could encourage other types of improper surveillance as well. For one thing, the bill does not cover the interception of international radio communications by the National Security Agency. Second, it does contain a controversial "disclaimer"

intended to reserve, without defining, whatever inherent power the President may have to "acquire foreign intelligence information" in circumstances "so unprecedented and potentially harmful to the nation" that Congress could not reasonably contemplate them. The scope of this power, if any, will ultimately be determined by the Supreme Court. The ACLU argues that until the court has spoken, such language—even though aimed at catastrophes—might tempt future administrations to engage in domestic spying, illegal break-ins and the like.

Most troubling is the fact that the legislation would permit court-ordered wiretapping of some persons who, while agents of a foreign power, are not involved in crimes. The Attorney General argues that this is necessary because some "clandestine intelligence activities," such as industrial espionage, may not be criminal but do bear directly on national security. While there is some merit to this, recent history shows how easily such imprecise language can be stretched. The Church committee, in fact, concluded that this was such a slippery slope that no electronic surveillance unrelated to criminal activity should be approved at all.

Such concerns should not be dismissed as nit-picking or paranoia. On the other hand, they do not justify jettisoning a measure which is so sound in many respects. Instead, they underscore the Judiciary Committee's obligation to be extremely careful and precise in drafting every aspect of this bill, so that no potentially dangerous loopholes or ambiguities are written into law.