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National Security Wiretap Policy

Remember the 17 so-called national security wiretaps on the phones of White House aides, government officials and newsmen that were initiated by the Nixon administration in 1969 and 1970?

The House Judiciary Committee, which looked into the circumstances surrounding them, charged they represented an abuse of power by Mr. Nixon. The legal authority of a President to undertake such wiretapping without a court warrant was, however, not disputed. Thus, when President Ford twice assured the country "there would be no *illegal* wiretaps" under his administration, that promise covered no more bugging of Democratic headquarters but it did not automatically mean no more warrantless wiretaps of government officials or newsmen in the name of national security where information of interest to foreign governments might be involved.

Sometime in the next month or so, Sen. John McClellan's subcommittee on criminal laws and procedures will hold legislative hearings on wiretapping in just this area. The focus will be a bill, originally drafted more than a year ago, which would require the government to obtain a warrant before taps in the national security foreign intelligence field could be initiated. A Supreme Court case in June 1972 made such warrants necessary in domestic national security cases.

It would seem that the upcoming McClellan hearings would be the perfect opportunity to explore the facts surrounding the Nixon national security wiretaps and make certain, perhaps through legislation, that the abuses they entailed would not occur again.

As things stand, however, that probably will not be the case. McClellan opposes the Nelson bill and only agreed to hold these hearings to head off a floor vote that could very well have seen the measure added to an appropriations bill. For McClellan, it is enough that FBI Director Clarence Kelley wants to keep the situation as it is and never mind what happened under President Nixon. As for Sen. Nelson, he has two problems. First, he is not a member of the subcommittee so all he can do is recommend witnesses. Second, he does not want to turn the hearings into either a show or a long-term investigation so his list is loaded with professors, lawyers and civil rights advocates whose views are already known. He has also included Morton Halperin, one of the 17 tapped (and who is suing the government) and William Ruckelshaus, who as acting FBI director disclosed the existence of the Nixon taps. Both Halperin and Ruckelshaus testified last year on wiretaps before another Senate subcommittee so they are not expected to tell anything new to the McClellan subcommittee.

It is possible now to predict what will happen. There will be three or four witnesses for Nelson advocating warrants in all wiretaps, whether foreign intelligence is involved or not. Attorney General William Saxbe or someone else from Justice, along with FBI Director Kelley will push for the status quo. If necessary, McClellan will have a closed-door session so Kelley can give the details of how one spy or another was caught under a situation that would have been impossible if a warrant had been required. There will be no thorough inquiry into the warantless wiretapping now under way, but the senators will be reassured that Justice Department regulations will prevent any wrongdoing. Unless pressed, the government officials will fail to point out that those same regulations existed and were summarily disregarded when the Nixon taps were under way.

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The hearings don't have to be that predictable. The McClellan subcommittee staff, though out of sympathy with the Nelson bill, could be asked to make a thorough inquiry into the 1969-1971 Nixon taps and provide a report to the subcommittee before the hearings begin. They just might find some new protections are needed even without resorting to warrants. Here are a few examples:

What factors must be present to indicate this is a foreign intelligence national security case requiring a wiretap? The Justice regulations require that a foreign power be involved as sponsor, director or controller of the activity, or that the activity be unlawful and threaten the security of the U.S. or that it be necessary to protect national security information from foreign intelligence.

The development of the Nixon taps showed such criteria could be widened, to a point where they became almost nonexistent. White House speechwriter William Safire was tapped because he was overheard promising to give an already tapped foreign newsman, London Sunday Times correspondent Henry Brandon, some advance information on a then-upcoming Nixon speech dealing with domestic matters. CBS diplomatic correspondent Marvin Kalb was tapped reportedly because the President wanted it done. Only later was it discovered—and used as justification—that Kalb had been assigned earlier in Moscow and knew Soviet embassy officials in Washington. White House political aide John Sears was tapped and followed, allegedly as part of an elaborate scheme to plant a story with him and see if he passed it on to newsmen.

What written approval and authorizations are needed to start a tap and keep it going over 90 days? Again, the regulations require the Attorney General's signature on an approval letter and a renewal of the tap authorization every 90 days. Former Attorney General John Mitchell has denied he signed the papers that bear his signature to start almost all the Nixon taps. No renewed authorizations were obtained for any, though the Halperin and Brandon taps went on for almost two years.

What type of information overheard on a national security foreign intelligence wiretap can be passed on? Even if a tap is justified, what limits are there in the handling of nonsecurity information overheard? On the Halperin tap and that of former Kissinger aide Anthony Lake, overheard political information was forwarded to the White House after Halperin and Lake went to work for Democratic candidates. From the Brandon tap, tid-bits on the correspondent's personal life and that of his friends and others in Congress were passed on. In one case a report was sent to the White House on how a congressman was going to change his vote on a civil rights bill.

What requirements are there to maintain records of such wiretaps? In the case of the Nixon taps, they were simply picked up and deposited in the White House, since they were kept separate from other warrantless national security taps. What is there to prevent such a special situation from developing again?

With a detailed report on the Nixon taps before it, the McClellan subcommittee would be in a better position to question the witnesses testifying in support of or opposition to the Nelson bill. Panel members might be in a position to force administrative changes if necessary though they fail to accept the Nelson bill or some other piece of legislation. Furthermore, should the hearings contain an exposition and questioning based on the Nixon taps, the subcommittee will be in a better position to explain its actions to colleagues in the Senate and to the public at large. That, in the end, is what the legislative process is supposed to be about. The post-Watergate period is giving the Congress the opportunity, the information and the incentive to climb back into a position of equality with the Executive Branch. The McClellan hearings would be a good place to start.

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