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Controlling Wiretaps

THE CONTINUING CONTROVERSY over warrantless wiretaps involves a central issue of democratic governance: when, if at all, the President or his agents may set aside the Bill of Rights in the interests of national security. In 1972 the Supreme Court, rejecting the Nixon administration's extravagant claim of autonomy to spy on citizens, held that warrantless wiretaps are not permissible in domestic security cases. The high court has not addressed the matter of wiretapping without court order where foreign policy is involved. The other day the U.S. Court of Appeals here did enter that area. In an important affirmation of the primacy of law, the appellate court held that a warrant is required to wiretap a domestic organization that, while involved in foreign affairs, is neither an agent of nor collaborating with a foreign power.

The Court of Appeals essentially ruled that the President may not wiretap at will just because the activities of a person or group affect foreign affairs. In this case the targets of surveillance were members of the Jewish Defense League, but the ruling would also protect countless others whose operations have an impact abroad. Circuit Judge Carl McGowan illustrated this by noting, in a concurring opinion, that a more expansive view of executive autonomy might sanction warrantless wiretapping of congressional critics of detente, "organized resisters of American military actions," corporations doing business overseas, international art thieves and the like. The appellate court properly refused to suspend the normal restrictions on electronic surveillance in such instances. As Judge McGowan wrote, the activities of such people and groups "are likely to be either criminal," in which case the requirements for warrants would apply, "or protected by the First Amendment, in which case there should ordinarily be no surveillance."

The decision, which is subject to possible appeal, did not dispose of the entire subject of national security taps. In the controlling opinion, Circuit Judge J. Skelly Wright did suggest that "absent exigent circumstances, no wiretapping in the field of foreign affairs should be exempt from prior judicial scrutiny." But the JDL case did not require the court to define the "exigent circumstances" that might constitute exceptions to the rule. The decision does, however, help to focus debate on what might be called the hard-core cases, those that do involve foreign agents or defense intelligence. These are the instances in which the national security interest is largest and most direct. These are also the cases in which, many would argue, the general distinction between criminal and lawful activities becomes least relevant because the purpose of surveillance is not just to capture spies, but to gather or protect vital intelligence.

For 35 years, successive administrations have maintained that the President's power to engage in wiretapping and bugging in such instances should not be restricted by Congress or the courts. The Justice Department advanced that argument again at a recent House hearing on bills that would outlaw warrantless wiretapping and bugging entirely. Administration spokesmen maintained that such a policy would be disastrous. In their view, it would put decisions involving the nation's most sensitive secrets in the hands of judges who might not be able to evaluate or protect that information. It would deny the President speed and flexibility in combatting foreign threats. And it would cripple the collection of crucial intelligence.

Such arguments should not be dismissed out of hand as another "national security defense" for widespread and casual invasions of individual liberties. In regard to a very narrow category of cases, the needs of national security should be seriously addressed. In saying that, we don't mean to suggest that we accept the view that the President alone ought to decide when those needs justify extraordinary steps. We find no weight, for instance, to the assertion that the judiciary cannot deal properly with national security cases. To the contrary, federal judges are developing more competence and sophistication in this field by the week, and their record for maintaining confidentiality is unsurpassed by any other arm of government. Similarly, nothing in past experience suggests that a requirement for court order, with some allowance for legitimate emergencies, would involve undue delay in placing wiretaps that are justified.

The problem of justification is to us the most difficult question in the intelligence field. As the administration asserts, the standards for electronic surveillance of that sort—again, in a very narrow area—will have to be carefully devised, and will no doubt entail more sophisticated judgments than those usually encountered in an ordinary criminal case. That is, however, all the more reason for Congress and the courts to be involved in working out and applying those standards. If recent experience has taught the nation anything, it is that systematic scrutiny by lawmakers and magistrates is essential to insure that executive powers are not abused.