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A Victory for Eavesdropping

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IN THE NATION

Wiretapping and bugging now appear to be the wave of the future in American law enforcement, and all those who think the resulting diminution of personal privacy and individual liberty is a good thing should stand up and cheer the American Bar Association.

At its winter meetings, just concluded in Chicago, the A.B.A. cut the ground from under those who had hoped there might still be a chance to hold the line against further Federal and state encroachment on private communication. If even the nation's lawyers give the green light to electronic eavesdropping by police and government officials, there is not much hope that the few remaining opposed voices will be heeded.

It is not only what the A.B.A. did at Chicago that hurts; it is also what it did not do. First, these officers of the courts and supposed guardians of citizens' rights voted that even when the Federal Government eavesdrops without a court warrant in a foreign intelligence case, the fruits of the eavesdropping are admissible in court as evidence for the prosecution.

Arguing for this proposition, a former A.B.A. president, Lewis F. Powell Jr., pointed out that it was only logical; if it is held that the Government can lawfully eavesdrop without a warrant, then it follows that the evidence thus gathered also has been made lawful. But this presupposes that Congress was right in the first place to grant the power to eavesdrop without court permission. Mr. Powell's argument really points up the fact that evidence once considered unlawful has been made lawful by act of Congress; what could not convict one man last year could convict him this year.

The lawyers then went further. They also urged the 38 states that still do not authorize electronic eavesdropping, under court order, to go ahead and do so by adopting a model state code proposed by the A.B.A. The idea apparently is to put eavesdropping under as strict court control as possible; but the net effect, as surely as night follows day, will be to extend this practice widely to law enforcement agencies that do not rely on it, and to make the practice itself respectable and acceptable as a law-enforcement tool.

In fact, there is much evidence to suggest that eavesdropping is often a wasteful and inefficient procedure, and the kind of crutch that deters development of more effective law enforcement; whatever else it is, eavesdropping is certainly a grab-bag search procedure in which the possibilities of abuse (particularly by corrupt and inefficient local forces) are inherent and rarely outweighed by productive results.

But having gone so far, the A.B.A. went further; it rejected three proposals that would have urged states enacting eavesdrop laws to place the practice under stricter regulation than the Federal rules. One of these proposals would have given defendants broader rights to pretrial disclosure of prosecution evidence obtained by eavesdropping; but the lawyers even turned that down.

Worst of all, however, the A.B.A. did not even consider the pernicious doctrine under which Attorney General John Mitchell and the Justice Department are claiming the right to eavesdrop, without any form of warrant or disclosure, on persons and organizations that the executive branch considers threats to the national security.

This item was not even on the agenda at Chicago. Yet, no issue of individual rights of such importance has arisen in America in years, if ever, because the Mitchell doctrine gives the Federal Government the literal power to eavesdrop on anyone it chooses, without ever disclosing or justifying to anyone—neither a court nor the subject—the fact that it has done so.

It does no good to argue that the Government could, in any case, do this illegally; the Mitchell doctrine would make the practice accepted and routine, as well as legitimate. Nor does it make any difference to contend that neither Mr. Mitchell nor President Nixon would condone misuse of such eavesdropping powers. Probably not, but who might next hold their offices and be given such unchecked and unlimited powers of surveillance?

Two Federal District courts have overruled the Attorney General, but he is appealing, and the issue remains in doubt. But even if the courts save us from this most dangerous of the wiretap threats, the A.B.A.'s actions and lack of action suggest an inexorable spreading of electronic surveillance by police and other officials. The eavesdroppers are winning, like Pyrrhus at Asculum.