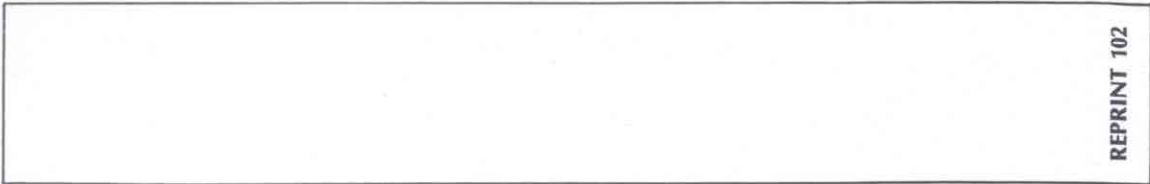




National Security Reprint



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and Civil Liberties**

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NATIONAL SECURITY AND CIVIL LIBERTIES

by Morton H. Halperin

No problem concerned the founding fathers more than how to balance the requirements of a strong government able to protect the nation from foreign enemies against the need to protect the rights of citizens from the danger of tyranny and usurpation by that same government.

The colonists had revolted against the British king in part because he had denied them the right to participate in their government. "No taxation without representation" represented the fundamental view that decisions affecting the lives and safety of free men should not be made without their participation, either directly or through their elected representatives. At the same time, the colonists were concerned with the attempt by the king to deprive them of the civil liberties of Englishmen: free speech, free press, and the right to be secure in their homes against unwarranted searches and seizure of their property. Indeed, a major source of indignation in the period leading up to the Declaration of Independence was the effort by the king's officers in the new land to support the hated taxes by engaging in general searches without a warrant.

Following the Declaration of Independence and victory in the War of Independence, there was an effort made to split the requirements of national defense from those of internal governance. The Continental Congress was limited essentially to matters relating to national defense and foreign policy. The administration of justice and other internal powers were exercised by the state governments. In establishing their own governments, the states almost uniformly drafted constitutions which contained a bill of rights similar to that ultimately adopted into the American Constitution and

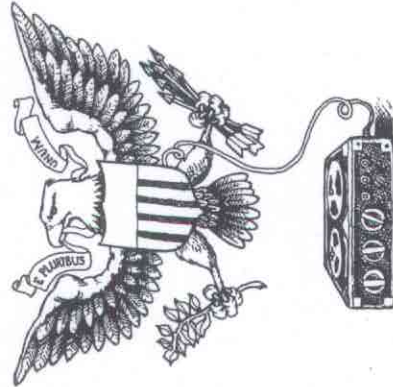
which in many cases included a prohibition against "general warrants," i.e., warrants authorizing the seizure of all material within a particularly designated area.

The Constitutional Convention reflected a consensus that the central government was too weak to perform effectively the functions involved with foreign policy and national defense. In setting up the new government, the framers sought to guard against tyranny by overlapping powers and by limiting the power of the president and of the Congress in various ways. No bill of rights was included in the Constitution as drafted by the convention in part, apparently, because it was not expected that the Federal government would exercise the kind of internal police and other functions which would in any way threaten the rights of citizens. Federalists argued that since the national government was only being delegated certain explicit powers it would clearly not have the power, for example, to interfere with free speech or to engage in warrantless general searches (searches conducted without a warrant issued by a judge). Police powers rested with the state governments, from which citizens were protected by bills of rights.

In the debates over ratification, no one argued that a bill of rights was undesirable because the Federal government would have to be free to take whatever action was necessary to defend the United States against foreign enemies or Indian uprisings. The framers were living in a period of what they saw as great danger to the independence and territorial integrity of the United States from European powers allied with Indian tribes. Nevertheless, none of them argued that in such periods the fundamental rights of Englishmen, which they believed they had inherited, could be suspended or taken away by the state in the name of national defense and foreign policy. The debate over the bill of rights was not over whether the central government should be controlled in this way, but rather whether such rights needed to be enumerated in the Federal constitution and

whether listing certain rights did not pose some danger of appearing to limit the controls on the Federal government to the rights specifically enumerated.

After the Federalists conceded the need for a national bill of rights, there was very little controversy about its content. Most of the same provisions appeared in each of the several state constitutions: freedom of speech, of the press, and of religion, and the right to be free of general or warrantless searches. The founding fathers clearly expected these restraints on the federal government to operate in times of trouble, which they then



believed themselves to be living in, as well as in times of tranquility. The balance between national defense and foreign policy requirements on the one hand and civil liberties on the other had been struck by the framers in a way that provided firm protection for certain inalienable rights. In practice they might disagree on how the balance was to be made in a particular case, but they recognized that the twin dangers existed: not only that the nation would be overrun by foreign enemies, but that it would succumb to tyranny and restriction of rights at home, perhaps, as Madison wrote to Jefferson, "charged to provisions against danger, real or pretended, from abroad."

The need to be constantly alert to the

to the protection of the Constitution. The United States, most believed, was governed and would always be governed by honorable men who would strike a proper balance between the requirements of national security and those of civil liberties, and in any case would not threaten the rights of most Americans or seek to usurp the constitutional procedures for governance and election.

As the United States moved into the Cold War period, a few individuals did warn of the dangers of a garrison state, of the possibility that a long siege of foreign policy threats would lead to erosion of civil liberties. But by and large, for most people, this was an anachronistic issue. There was simply not seen to be any incompatibility between the maintenance of the foreign policy and national defense posture necessary to deal with the Communist bloc and the protection of civil liberties against usurpation which was now seen largely coming from state governments. Limits on "Communists" were not a concern to most Americans since these were individuals who had pledged loyalty to a foreign power.

The Effects of Watergate

Watergate served a function in alerting Americans again to the problems which concerned the founding fathers. One of these was the danger of a tyrant: that an individual would simply abuse the power of the presidency to attempt to seize power for himself and his supporters and to limit the civil liberties of others. The presidential transcripts of Richard Nixon showing him inventing the national-security defense for the break-in at the office of Daniel Ellsberg's psychiatrist, Dr. Louis Fielding, is but one example that Watergate gave us of the cynical manipulation of the phrase "national security" in the pursuit of power. The lesson has clearly been drawn. A claim of "national security" should not be used to cover abuse of power.

But Watergate also helped to alert many Americans to the equally serious problem of

balancing a genuine concern for foreign policy and national defense, now known collectively as national security, against the civil liberties of American citizens embodied in the Bill of Rights.

This balancing requires bringing to bear on any particular problem two kinds of expertise: (1) the expertise of those who understand constitutional procedures and civil rights and what is needed to protect these; and (2) the expertise of the national security specialists who can assess the requirements of foreign policy and national defense and how they might be affected by various restraints deriving from constitutional rights.

In general, in the period since World War II, this balancing has not been done effectively. Foreign policy specialists, both in and out of government, have left the field to intelligence agencies which have determined policy and, when the issues have become exposed to public view, done battle with civil libertarians.

Thus, for example, the argument about what kinds of controls had to be put on the Communist Party was waged between the FBI on the one hand and some civil-rights advocates on the other. Similarly, the issue of national security wiretaps has, until now, been a debate between those in the intelligence community who sought the information to be gained from wiretaps and civil-rights advocates on the outside who argued for the application of the Fourth Amendment. The balancing which has been done has been done by the courts. The Supreme Court has gradually developed a doctrine that holds in effect that a constitutional right (such as the right of free speech) may be infringed only if there is a compelling state interest which cannot otherwise be met and then only if the restriction on the constitutional right is as narrow as possible to pursue the given state interest. Following this doctrine, the courts have upheld a refusal to license the importation of books from North Vietnam on the grounds that there was compelling state interest in ad-

versely affecting the North Vietnamese economy. The regulation which was approved banned all imports and not simply books based upon their content. The courts accepted the notion that this was the narrowest restriction which would be effective. As is typical in such cases, the balancing was only done with government expertise being brought to bear on the question of the compelling state interest. The court took for granted the value of preventing trade with North Vietnam and simply attempted to balance it against constitutional rights.

Such balancing is unacceptable since it does not bring to bear expertise from national security specialists who, with some appreciation of the civil-rights issues, can assess what the actual value to national security is of particular kinds of government actions. In the post-Watergate/Vietnam era, Congress and the executive branch, as well as the courts, are seeking to come to grips with a variety of issues which require a balancing of national security requirements against constitutional rights. These issues include the charters of the intelligence organizations, the classification system, the espionage laws, prior restraint, and the Freedom of Information Act. In all of these issues there needs to be an active involvement of national security experts from outside the government and expertise from inside the government but beyond the intelligence community.

This need for balancing can be illustrated by dealing with any specific issue. Let me focus on national security wiretaps, attempting to deal substantively with how this issue should be handled and using it to illustrate the more general problem of returning to an appropriate balancing of national security interests against constitutional rights of the kind envisioned by the founding fathers.

National Security Wiretaps

Warrantless wiretaps were an important part of the Watergate story. The burglars

had previously installed one tap and went in to replace a second which was not operating. As a result of Watergate we learned of the taps on 17 government officials and newspapermen, on those suspected of leaks to Jack Anderson, on Joseph Kraft and Donald Nixon. More recently, the Rockefeller Commission reported on CIA wiretaps to track down leaks. Wiretaps on domestic organizations such as the Jewish Defense League and the White Panthers have been admitted in the course of litigation. Although some of this surveillance has been ruled illegal by the courts, the Justice Department reports that some 100 warrantless national security wiretaps are in operation each year.

The policy issues surrounding these wiretaps are in the process of resolution. The courts have before them a number of warrantless wiretap cases, including my own. The Justice Department is currently engaged in a re-evaluation of its policy on wiretaps and promises new guidelines for the FBI. A number of legislative proposals to limit or eliminate wiretaps conducted for national security purposes have been introduced in the Congress.

The Competing Interests in Wiretapping

The government has asserted three interests in engaging in wiretaps for "national security" purposes (apart from wiretapping to detect possible violations of the criminal law, including the laws against espionage, sedition, and treason). These are: (1) gathering foreign intelligence information; (2) preventing information about the United States from reaching foreign intelligence services; and (3) protecting the United States against internal threats to its stability.¹

Gathering of foreign intelligence relates to the interception of telephone calls made

¹The FBI also has engaged in wiretapping against domestic organizations which it claimed were threatening domestic stability in the United States. These activities are not justified on grounds relating to foreign policy or national defense and hence are not dealt with in detail in this article.

on the office and home telephones of embassy personnel. These will include calls between diplomats in the United States and their governments, calls between embassy officials within the United States, and calls by others to embassy telephones.

Preventing information from reaching foreign intelligence services is difficult to separate from the FBI's investigation of criminal activities, including violations of the espionage law. It appears to be the case, however, that the FBI uses its intelligence staff rather than its criminal investigating staff to monitor the activities of Soviet and other intelligence agents in the United States. The FBI in such cases resorts to its asserted power to wiretap without a warrant to investigate such activities, rather than seeking a warrant under the Safe Streets Act of 1968. This permits the bureau to proceed without the procedural restrictions put on the investigation of criminal activity, including the need to show "probable cause" before a warrant can be obtained. A second activity under the counterintelligence mission relates to preventing leaks of national security information. At least until recently, the FBI claimed the right to engage in warrantless wiretapping for national security purposes in order to track down leaks by wiretapping telephones of newspapermen and government officials.²

The FBI has also recently claimed the right to wiretap domestic organizations whose activities in some way embarrass or threaten

²Some public statements by administration officials suggested that government employees wielded some of their constitutional rights and could not object to wiretapping of their office or home phones. This claim has never been made by Justice Department lawyers in legal proceedings or testimony by administration witnesses. It might be perceived as a personal observation I never believed when I entered government service that I gave up the privacy of my home and, at the time, no one suggested to me that I had. Moreover, the tap on my home telephone for 2 1/2 months shows the abuse to which any such power would be open. The tap continued for 17 months after I left the government. Of the calls summarized by the FBI, more than 25 per cent were between me and my wife; many involved each of us discussing political activities and there were some conversations relating to antiwar activity and Senator Muskie's presidential campaign.

the foreign policy of the United States. Most prominent among these was the Jewish Defense League, which was subjected to extensive wiretapping because of its picketing of the Soviet embassy and the U.N. mission as well as alleged violations of the law in attacking Soviet embassy officials.

Constitutional rights, on the other hand, stem from the First and Fourth Amendments and from the interaction between the two. The Fourth Amendment guarantees American citizens against unreasonable searches and seizures, generally interpreted to mean any search without a warrant and any general search, that is, one that does not particularize what is to be seized.³

Wiretapping and other electronic surveillance may also affect the First Amendment right to free speech, free press, and free association in that it interferes with the exercise of those rights and may cast a chilling effect on them by raising the fear that the government is monitoring those activities.

Indeed, as the Supreme Court, in the opinion written by Justice Powell, has noted, there is often an important interaction between the two when a government monitors activities of political groups. Justice Powell put it this way:

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Marcus v. Search Warrant*, 367 U. S. 717, 724 (1961). History abundantly documents the tendency of Government documents the tendency of Government documents—however benevolent and benign its mo-

³The Fourth Amendment reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

tives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect "domestic security." Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. Senator Hart addressed this dilemma in the floor debate on § 2511 (3):

As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government.

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

The questions which the United States now faces in seeking to balance these competing interests are as follows:

1. Apart from its investigation of crimes covered by criminal statutes and requiring a search warrant, should the executive branch be permitted to engage in electronic surveillance for national security intelligence purposes?
2. If so, should such surveillance require a warrant to be issued by a judge?
3. If a warrant is to be required, under what standard should it be issued?
4. If no warrant is required, what internal standards and procedures of the executive branch should be required for the issuance of a warrant and what steps should be taken to insure that these procedures are followed?
5. If there are to be national security wiretaps apart from the investigation of

searches based upon general warrants. Most of the controversy surrounding the Fourth Amendment concerns exceptions to the warrant requirement. With the exception of one brief period, the Supreme Court has consistently held that any warrantless search is, *per se*, unreasonable except in certain very narrow circumstances. These circumstances relate entirely to situations in which there is no time to get a warrant without a grave risk that evidence will be destroyed or that the life of a police officer will be put in danger. For example, a policeman is permitted to search the front seat of a car to make sure that somebody he has stopped has not stored a gun there which might be suddenly put to use.

Until Watergate, no one had claimed that "national security" created an exception to the Fourth Amendment, except perhaps in the case of wiretaps.⁴

Are Wiretaps Covered by the Fourth Amendment?

The invention of the telephone and then the technology to intercept messages using telephone wires were both, of course, totally unanticipated by the founding fathers. These developments raised the question for the court of whether or not such interceptions were violations of the Fourth Amendment if conducted without appropriate warrant procedures. Initially, the Supreme Court (in *Olmstead*) took the position that the Fourth Amendment related strictly to trespassing onto the property of an individual as that term was defined in the common law. Thus, if a wiretap or other electronic surveillance

⁴ This issue appears to have been settled in the case involving Soviet spy Rudolf Abel. The Supreme Court was confronted with a claim by Abel that the evidence used to convict him had been seized in violation of his Fourth Amendment rights. The government did not contend that because this was a national security case the Fourth Amendment or its warrant requirement did not apply. Both the opinion of the court and the dissent noted in passing that the Fourth Amendment applied fully and that Abel, a Soviet spy and illegal alien, was entitled to its full protection. The Abel court split 5-4 on whether Abel's Fourth Amendment rights had been violated, a bare majority holding that they had not been.

were accomplished without any trespass onto the actual property of an individual, the court held that it did not in fact violate the Fourth Amendment.

The Court soon undercut the impact of that decision by holding that Section 605 of the Federal Communications Act meant that no message sent on wires, whether by cable or by telephone, could be intercepted and divulged without the consent of the parties involved. As we shall see below, the executive branch interpreted that to permit interception as long as the material were not communicated beyond the executive branch of the government, but it did mean that wiretaps could not be used as part of criminal investigations.

The Supreme Court held that Section 605 not only barred the use of evidence from wiretaps but also evidence gained from leads obtained from wiretapped conversations. In a case involving suspected spy Judith Coplon, Judge Learned Hand held that Section 605 applied even when a wiretap was installed for national security purposes and was authorized by the attorney general.⁵ There the matter stood for some time.

Wiretaps were not entitled to the protection of the Fourth Amendment but they could not be used in criminal investigation or otherwise divulged since they violated Section 605 of the Federal Communications Act.

The Supreme Court, however, had become increasingly unhappy with its decision in *Olmstead*, holding that wiretaps did not

⁵ No court has questioned Congress' power to ban all wiretaps including those justified on national security grounds. However, the question of whether Section 605 was meant by the Congress to apply to national security cases is a long and tangled one. The early courts held that it did, and more recently several circuit courts have held that Congress did not intend to limit the president's ability to wiretap in the interest of national security in Section 605 of the Federal Communications Act. In 1968, in passing the Safe Streets Act, Congress specifically exempted both that act and Section 605 from limiting any presidential power to wiretap in the interest of national security. Since this controversy is now moot, I will not attempt to deal with this tangled debate about statutory construction. On this issue, see, for example, the varying opinions in *U.S. v. Butenko*.

violate the Fourth Amendment, and finally moved to overrule it. In *Berger* and *Katz* the Supreme Court held for the first time that wiretaps were fully subject to the Fourth Amendment. In a famous phrase it stated that "the Fourth Amendment protects people, not places," and that therefore it would provide protection for any conversation conducted with a reasonable expectation of privacy. This, the courts said specifically, included conversations carried over telephone wires.

Cases cited in this article:

Abel v. U.S. 362 U.S. 217 (1960)
Alderman v. U.S. 394 U.S. 165 (1968)
Berger v. N.Y. 388 U.S. 41
Giordano v. U.S. 394 U.S. 310 (1969)
Katz v. U.S. 389 U.S. 347 (1967)
Olmsstead v. U.S. 277 U.S. 438 (1928)
U.S. v. Brown 484 F. 2d 593 (1974)
U.S. v. Butenko 494 F. 2d 593 (1974)
U.S. v. Clay 430 F. 2d 165 (1970)
U.S. v. Copleton 185 F. 2d 629 (1950)
U.S. v. Ehrlichman 376 F. Supp. 29 (1974)
U.S. v. U.S. District Court 407 U.S. 297 (1972) cited as *Keith*
Zweibon v. Mitchell 516 F. 2d 594

Despite the mystique that surrounds Supreme Court decisions and the civics-book notion that they somehow emerge from the Court as inevitable interpretations of the Constitution, it is clear that a great deal of negotiation and compromise often is necessary to secure a Supreme Court majority. To obtain a majority holding that wiretaps violated the Fourth Amendment three compromises were necessary.

The first involved the question of general warrants. Many civil libertarians have argued not only that wiretaps were covered by the Fourth Amendment but also that telephone surveillances by their nature violated

the Fourth Amendment since they were general searches intercepting all conversations. The *Katz* court rejected that argument, stating that Congress could constitutionally authorize wiretaps with a warrant under specified circumstances. These included: (1) specifying what conversations were to be overheard, (2) avoiding the interception of other conversations, and (3) limiting the time period of the surveillance.

The second compromise involved retroactivity. The Court held that it would not apply its decision to wiretaps which took place before the decision was handed down.

The third compromise is directly relevant to this article. The Supreme Court for the first time suggested that the Fourth Amendment warrant requirement, at least as it related to wiretaps, might be different in national security cases. The Court did not reach this position. It merely left open the possibility. It did so by noting in a footnote:

Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

Several members of the Supreme Court had served in the Justice Department and were aware of embassy taps. It appears that these surveillances were at the core of the concern of the justices who desired to leave this question open, but the Court's opinion made no effort to define national security. Justice Byron White, who had served as deputy attorney general in the Kennedy Administration, stated in a concurring opinion his view that national security wiretaps should not require a warrant. He offered no further definition of the term, nor did Justices Douglas and Brennan who, in another concurring opinion, expressed the view that the Fourth Amendment warrant requirement must be the same for all cases, including those involving national security. Justice Douglas did note that "spies and saboteurs are as entitled to the protection of the Fourth

Amendment as suspected gamblers." Two actions, one by the Supreme Court and one by the Congress, would, however, within the next few years force the courts to come to grips with the question of a national security exemption.

The action by the Supreme Court flowed from its rule that evidence obtained in violation of a constitutional right cannot be used in a criminal prosecution. The Court has interpreted this rule to mean that the evidence obtained from an unconstitutional search cannot be used as the basis for obtaining admissible evidence. If an accused person has been the subject of an illegal search, the court must be satisfied that none of the evidence has been tainted by the search.

Wiretaps pose unusual problems in this regard since many conversations may be overheard which provide leads and because the individual does not know if his conversations have been overheard. The Supreme Court in *Alderman* laid down the rules for dealing with possible unconstitutional wiretaps occurring after its *Katz* decision. The Court held that anyone indicted (or called before a grand jury) could demand to know if he or she had been overheard on an electronic surveillance. If so, the Court would be provided with the rationale for the surveillance and the procedures followed and would determine if the surveillance were legal. If it were not, then the logs of the conversations would have to be turned over to the defendant for a taint hearing. The court would not by itself determine if evidence introduced at the trial had been derived from the unconstitutional surveillance.⁶

⁶ This decision in the closing days of the Johnson Administration was greeted with great concern by John Mitchell and his associates in the Justice Department. According to later press accounts, they sent a department official to talk with several members of the Supreme Court to get them to reconsider the decision. While there was no reconsideration, in a concurring opinion in a future case Justice Stewart stressed that wiretap logs would be turned over to defendants only after the court found the wiretaps to be illegal. He emphasized that the Supreme Court had not yet stated any opinion on warrantless national security wiretaps [*Alderman v. U.S.*, 394 U.S. 165 (1968)].

The *Alderman* decision meant that any time an individual was indicted, he could demand a search of the wiretap files of the government. If it were revealed that he had been overheard on a warrantless "national security" electronic surveillance, the court would have to determine if the surveillance were illegal. This requirement has led to a number of court decisions on the legality of various kinds of "national security" wiretaps.

The second event which has triggered extensive litigation on the question of warrantless "national security" wiretaps was the passage by Congress in 1968 of the so-called Safe Streets Act which for the first time provided a procedure for wiretaps under warrants by federal officials. That act basically held that all wiretaps were illegal except if conducted under the provisions of the Safe Streets Act itself. Responding to the Court's invitation in *Katz* and *Berger*, the act specified procedures designed to insure that the search was reasonable and that it did not amount to a general warrant. At the same time, in order to discourage illegal wiretaps, the act provided that anyone whose phone was tapped in violation of the Safe Streets Act could sue for civil damages and would be entitled to damages at the rate of \$100 a day for each day of illegal interception, use, or transfer of information from an illegal interception.

In passing this legislation, the Congress explicitly left open the question of whether wiretaps without a warrant would be permitted in certain national security situations. The relevant portions of the Safe Streets Act read as follows:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1103; 47 U. S. C. § 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the

United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power. (emphasis supplied)

We can best understand the court decisions which have followed as a result of *Alderman* and the Safe Streets Act by pausing to consider how practice has evolved in the executive branch. With the passage of Section 605 of the Federal Communications Act, most wiretapping by the Federal government appears to have ceased except for that connected with national security. In 1940, President Franklin Roosevelt sent a directive to his attorney general indicating that he did not interpret a court decision holding that Section 605 required the suppression of evidence obtained from wiretaps to prohibit wiretaps against enemy agents, and authorized electronic surveillance "of persons suspected of subversive activities against the government of the United States, including suspected spies." Roosevelt's memorandum concluded: "You are requested further to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens."

This directive was in 1946 renewed by President Truman in a slightly broadened form which omitted the directive to minimize the use of surveillance.

Under Roosevelt the surveillances apparently focused on suspected Nazi and Japanese sympathizers, although pacifist and other antiwar groups may also have been

subjected to electronic surveillance. Under Truman, the Communist Party and other Communist and front groups were the subjects of surveillance but the use of this technique seems to have spread to other groups. Indeed, little is known about the criteria employed by the FBI and the Justice Department in approving electronic surveillances under Truman, Eisenhower, or Kennedy.

President Johnson moved to regularize procedures in 1965 by directing that all national security wiretaps in the United States should be conducted by the FBI with the approval of the attorney general.⁷ The criteria employed appear to have been quite loose since a surveillance against Martin Luther King was continued based on the allegation that he was in contact with a Communist agent.

During the Nixon Administration, the claimed right to engage in warrantless electronic surveillance was greatly broadened to include antiwar groups and other "dissident" groups and individuals. The coverage of such groups was greatly expanded, leading to a number of situations in which an indicted individual either had been the subject of a surveillance or had been overheard.⁸ In such cases, the courts were compelled to decide if a warrantless national security surveillance were legal. The Supreme Court in one such case held that, in cases involving domestic security, warrants were required. In that case,

⁷ This memorandum appears to have brought a halt to most taps by other agencies within the United States although both the CIA and the Secret Service are known to have conducted at least one surveillance since the memorandum was issued. Neither the National Security Agency's surveillance of international communications nor the army's overseas electronic surveillance programs was affected by this memorandum. Both programs continue.

⁸ The number of electronic surveillances did not go up appreciably during the Nixon Administration's early years. Nor did it go down following the court decisions described below. Although there may well have been some juggling of rationales to conform to the changing law, the basic explanation for the relatively constant number appears to be bureaucratic. The units conducting the surveillances have a fixed number of lines leased from the telephone company and act to keep them all in use; also, they struggle to keep their share of the budget.

commonly known as *Keith*, the Supreme Court, without dissent, rejected the government's argument that the courts were not capable of evaluating the rationale for an electronic surveillance. Justice Powell put it this way:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ordinary crime. If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance [*U.S. v. U.S. District Court*, 407 U.S. 297 (1972)].

The Supreme Court declined to decide the entire issue. It emphasized the limited nature of its decision and that it was asserting no opinion on whether other national security surveillances would require a warrant. It explicitly left open the question of whether warrants would be required in cases involving foreign powers or their agents.

Subsequent criminal cases have apparently involved surveillances directed against foreign powers or their agents. Here most courts, including three courts of appeals, have held that the president may tap foreign powers or their agents without a warrant without violating the Fourth Amendment.

The Appeals Court for the District of Columbia has declined to make such a finding and, in a case of surveillance of the Jewish Defense League, held that even when national security was involved a warrant was required. The plurality opinion of four judges held that "a warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if surveillance is installed under presi-

dential directive in the name of foreign intelligence gathering for protection of the national security." The Justice Department has not yet decided whether to appeal that decision, but President Ford has directed the Justice Department to observe it throughout the country until and unless it is reversed on appeal.

"Nobody in the intelligence community has seen any civil-liberties question involved in such surveillance despite the fact that they must routinely overhear hundreds if not thousands of conversations of American citizens each year."

This is where the legal situation stands. Warrants are required for electronic surveillance of any American citizen or resident alien who is not the agent of a foreign power. The Supreme Court has not yet ruled on whether warrantless wiretaps violate the Fourth Amendment where the surveillance is directed against a foreign power or its agent; it has refused to rule on the issue in several cases presented to it. Two circuit courts have held such wiretaps to be constitutional and the D.C. circuit has implied that it will hold such a tap unconstitutional when and if confronted in the future with such a case.

Current practice is more difficult to define. In the past, the FBI and the CIA have both engaged in warrantless wiretaps directed against American citizens, including government officials and newspapermen, in an alleged effort to track down leaks. While such surveillance appears to be ruled out by the circuit court's decision in *Zweiborn*, if not the Supreme Court's decision in *Keith*, the Justice Department, in defending against lawsuits brought under the Safe Streets Act, has continued to assert that the president has the power to engage in warrantless wiretaps for this purpose. On the other hand, the attorney general declared in early 1975 that

there were not then any surveillances directed against American citizens and that none would be installed unless there were reason to believe that they were agents of foreign powers. The Justice Department is currently working on regulations which presumably would define the standards to be employed in determining whether an American citizen or a resident alien is in fact an agent or a collaborator with a foreign power.

At the same time, the FBI maintains approximately 100 wiretaps apparently directed at foreign powers: embassies, consulates, U.N. missions, and perhaps trade or newspaper offices. Such surveillances often pick up conversations of American citizens. They must be reported to a court (assuming they can be located) if a citizen who has been overheard on such a surveillance is indicted. The president has directed that no wiretaps be conducted within the United States except by the FBI. However, both the military and the National Security Agency (NSA) apparently have extensive wiretap programs overseas, in which they overhear conversations of American citizens. Various bills have been introduced in the Congress which would have the effect either of banning completely all wiretaps except those permitted under the Safe Streets Act or of authorizing certain kinds of national security wiretaps under a new warrant procedure. The Justice Department has not yet responded to the Supreme Court's invitation given in the *Keith* case (and reaffirmed in *Zweiborn*) to ask for a different standard for carrying on intelligence-gathering wiretaps against American citizens who are not agents or collaborators with foreign powers.

What Value the Taps?

Before considering current policy options, the question of the value, for national security, of the wiretaps currently being conducted needs to be examined. The value of wiretaps of embassies and other foreign personnel is difficult to discuss without access to and use of classified information. It is

beyond dispute that all diplomats assume that their telephone conversations are monitored. Thus, most of what diplomats say on the phone they either assume is being overheard or, in some cases, may even want to be overheard. It is extremely doubtful that on a regular basis any information of great value is overheard in such telephone conversations. Even if one were to overhear information which if true would be of great value, one would have to consider whether the information were false and were being planted. Thus, what can be learned from such telephone conversations can hardly be said to be critical when compared to satellite photography and other forms of reconnaissance and technical intelligence gathering. Rather, what such wiretapping can add is one type of gossip or another.

"Lawful dissent and opposition to a government should not call down upon an individual any surveillance at all and certainly not surveillance as intrusive as a wiretap."

A detailed examination of this question would require access to classified information of various kinds. One would have to not only look at the take from various national security wiretaps, but also compare that information with the results of other forms of intelligence gathering. One would then have to assess the additional information gained from the wiretap in terms of the foreign policy interests of the United States and then determine whether the information had been or might have been put to a significant use. It seems safe to say that such a study has not been done. Nobody has any incentive to do such a study. Most members of the intelligence community seem quite content to simply get the fruits of this surveillance and to use them when possible. From their point of view, there is no cost and hence no need to examine the consequences. Moreover, nobody in the intelli-

gence community has seen any civil-liberties question involved in such surveillance despite the fact that they must routinely overhear hundreds if not thousands of conversations of American citizens each year.

If such wiretaps are of limited value, why is it that so many of them are conducted? The explanation may be found in the bureaucratic behavior of large organizations: > *The struggle over missions.* One of the most enduring characteristics of the Federal bureaucracy is the struggle over responsibilities. Each agency has a view of its essence—its core activity—and struggles to keep responsibility for the areas it has while broadening into other related areas. Such a struggle over turf engages the FBI in its relations with the CIA, the NSA, the Defense Intelligence Agency, and the armed services intelligence branches. The FBI seeks exclusive control over investigations within the United States while the "foreign" intelligence agencies seek responsibility for gathering all "national security" information.

When such a conflict exists, the agency responsible for the mission must constantly demonstrate its willingness and ability to perform the mission. The competing organizations seek to show that that organization is unwilling or unable to commit the resources necessary to do the job right. In this classic situation, the consuming agencies continue to raise their demands while the performing group struggles to meet the requests. The foreign intelligence agencies, eager for the responsibility to monitor embassies, would like nothing better than a record of FBI refusals to perform a requested surveillance. The FBI is unwilling to create such a record. Thus requests for surveillance will be generated whenever a remotely plausible case can be made and the FBI will be reluctant to challenge the asserted need.

> *The extravagant use of "free goods."* There is another reason why the foreign affairs agencies are likely to be casual about requesting surveillance in the United States. The budgetary and manpower costs of the

surveillance are not charged to them. If the NSA wants to increase its monitoring of coded messages to and from country X, it must find the money and trained personnel in its budget. Telephone taps or bugs of the embassy are a "free good," paid for from the FBI budget. Bureaucrats, like individuals, have a tendency to consume a great deal of any free good without asking how much it is costing someone else.

> *The failure to take other values into account.* Bureaucrats feel neither the need nor the capability to take the values of society, other than those with which they are formally charged, into account in making decisions. For the foreign affairs agencies, which generate the requests for surveillance, not only is there no cost, but the possible infringement of constitutional rights is not viewed as a legitimate concern. Their responsibility as a legitimate concern. Their responsibility is to gather information needed by foreign policy decision-makers; it is someone else's job to worry about civil liberties.

One might have expected the attorney general to play this role, but he has not really been equipped to do so. What he would need is a staff, skeptical about the foreign policy value of such surveillance and concerned with civil liberties, which could make the case against any proposed surveillance. In the absence of such a staff he is likely to be overwhelmed by assertions of what the "national security" indeed requires.

> *Unplanned payoffs of value to the bureaucracy.* Often an agency will pursue a program with enthusiasm for reasons unrelated to why it is asked to undertake the activity. I suspect such a phenomenon is at work here.

A Pernicious Notion

All wiretaps pose a great risk of violating the Fourth Amendment right to privacy, since by their nature they tend toward general warrants. Only recently has there developed the pernicious notion, now extended by the Justice Department to burglaries as well as to wiretaps, that somehow the Fourth Amendment operates differently

when the president invokes the magic words "national security." Clearly we should return to the view of the founding fathers, and that held by the Supreme Court until recently, that the Fourth Amendment applies equally when issues of national security are alleged to be at stake as it does when the government has any other motives for seeking to invade the privacy of one of its citizens.

The analysis of the national security value of wiretaps directed at foreign intelligence gathering suggests that such activities are of extremely limited value compared to other intelligence gathering methods of the United States government and can in no sense be termed "vital." As far as American citizens who are not agents or collaborators with foreign powers are concerned, Congress should resist any proposal to give the government power to wiretap with or without a warrant on any standard less than probable cause to believe that a crime is being committed. Certainly we have learned enough in the past years about the possible abuses of what the FBI calls "intelligence investigation" to know that no executive branch officials should be given the right to determine that a wiretap is needed. Lawful dissent and opposition to a government should not call down upon an individual any surveillance at all and certainly not surveillance as intrusive as a wiretap. Even the fear that such a wiretap might occur can cast a chilling effect on political dissent.

If surveillance may be directed at government employees, some will decline to serve and others will restrict their permitted political activity. Warrantless surveillance creates a vast paranoia now endemic in our society. Many believe their telephones are tapped and political activists do run a substantial risk of being overheard. Some may well restrict their political activity for fear of being subjected to surveillance or, fearing they are under surveillance, hesitate to speak. For many the belief in widespread electronic surveillance contributes to a cynicism about our democratic institutions.

Court decisions leave the government free to engage in warrantless wiretaps where it believes an individual or an organization is collaborating with a foreign power. Several courts have upheld the legality of such wiretaps. The D.C. circuit court has suggested that it views such wiretaps as illegal; the Supreme Court has declined thus far to consider the matter. The executive branch still claims the authority to wiretap in such situations.

One question to be answered is the definition of "agent or collaborator with a foreign power." Whatever the definition, can this be based on suspicion or does there have to be probable cause?

Another question is the procedures by which such a decision is to be made. The attorney general, at present, is the only one who is authorized to approve warrantless national security wiretaps. Whatever confidence one may have in the current attorney general, that procedure is surely not sufficient to assure that wiretaps will only be placed on individuals who are, in fact, agents or collaborators with foreign powers, even assuming that such warrantless wiretaps should be permitted. Moreover, since many individuals will be suspicious of how these standards are being applied, the chilling effect, the vast paranoia within the country that one's phone is being tapped, will necessarily continue as long as the government is conceded the right to wiretap without a warrant whenever it suspects that an individual is an agent or a collaborator with a foreign power.

Moreover, there is no reason why the government should have such power. If an individual is suspected, with probable cause, of collaborating with a foreign government in an illegal activity such as espionage or treason, then the government can get a warrant for a wiretap under the Safe Streets Act. If, on the other hand, the collaboration with a foreign power is legal, then there is no reason why the executive branch should be permitted to engage in wiretapping—with or without a warrant—of such individuals.

Hence, Congress should establish clearly that wiretaps of American citizens and others entitled to the protection of the Bill of Rights, including resident aliens, should be limited to provisions of the Safe Streets Act. That is, such warrants should be issued only upon probable cause that a crime is being committed and only with the safeguards of the Safe Streets Act.

This leaves the question of wiretaps against diplomats and others entitled to diplomatic immunity and hence arguably not entitled to the protection of the Bill of Rights. One possibility is to abolish such wiretaps and this would be the most effective guarantee of the civil liberties of Americans. It would assure that such wiretaps are not used, as they appear often to be, to overhear the conversations of American citizens and to learn which American citizens are in friendly contact with a particular foreign government. Moreover, as I suggested above, such a procedure would have only a very small effect on national security and the gathering of foreign intelligence information.⁹

An alternative approach is to permit such wiretaps but only with a judicial warrant. It is sometimes argued that such warrants are unnecessary and useless since a magistrate will always grant a warrant on the request of the executive branch—for example, to tap the Soviet embassy. However, this argument ignores the fact that accompanying a warrant can be rigorous procedures to ensure that a tap is not used for an irrelevant purpose and does not involve unnecessary and undesirable intrusion into the privacy of American citizens. It can also ensure that the full range of legal issues, as well as the desirability and value of the intelligence, is fully taken into account before a wiretap of an embassy or other facility is approved.

The arguments made against requiring warrants are that there is a danger of leaks

⁹ Such wiretaps might well violate the Vienna Convention, which requires that the premises of a diplomatic mission be "inviolable."

and that a judge does not have the background to decide if a surveillance is warranted. On the question of leaks, there is no merit to the argument. Courts have received many highly classified documents and put them under protective orders. Violations of such orders are subject to criminal penalties and no leaks are known to have occurred. The assertion that judges cannot make decisions on such questions assumes that those in the executive branch who make such decisions do so on the basis of deep involvement in using and evaluating such materials. In fact, the decision is made by the attorney general, who is not otherwise involved extensively in foreign intelligence matters. He makes such decisions based on a memorandum not any different from what would be submitted to a judge to obtain a warrant.

As long as the president and the attorney general retain any power to wiretap without a warrant there will always be the fear, often perhaps justified, that the authority will be stretched to include other cases. For example, if taps against embassies and embassy personnel are authorized, then may a tap be put on the home of an ambassador's girlfriend or may a tap be put on the home of a friend of an ambassador whom he often visits and uses to make phone calls? One's imagination can be used to stretch such an authorization further in various directions. If, on the other hand, a judicial warrant is required for all wiretaps, then one can be reasonably sure that a magistrate will not permit the bending of the rules as explicitly laid out by Congress in legislation. Moreover, and perhaps more important, the requirement for a warrant can assure that whatever procedural regulation the Congress establishes will be followed. This should include rigorous procedures to assure that a wiretap is not in fact being placed to overhear conversations of Americans rather than to learn foreign intelligence information. This can be accomplished in part by directing that any warrant must be accompanied by a careful analysis of the estimate of how many conversations of

American citizens are likely to be overheard. Any renewal of such a warrant, perhaps after 30 or 60 days, can also require a report on the number of conversations of American citizens overheard on the surveillance. The legislation authorizing such wiretaps could also provide that special monitors screen the contents of such conversations and permit the passing on to intelligence organizations only that material which was particularized in the warrant. The screeners would ensure that no information about the political beliefs or activities of American citizens was passed on from the monitors of the wiretaps to officials of intelligence organizations. At the same time, the procedures should require that the warrant be accompanied by an assessment from an official of the government responsible for foreign policy, such as the secretary of state, the assistant to the president for national security affairs, or perhaps the director of central intelligence, specifying that he has considered the alternative means to gain the information likely to be learned from the wiretap and that it is his judgment that the information likely to be gained from the wiretap is important to the security of the United States. A similar affidavit would have to accompany any renewal of the wiretap.

Finally, in order to discourage the use of this technique as a backdoor way to gather evidence about American citizens, the Congress could require that such information could not in fact be passed on to law enforcement agencies or in any way used in the investigation of a crime. The lodging with the court of all names of those overheard could ensure that such information was brought to the attention of any criminal defendant, who would then be given an opportunity to determine whether or not tainted evidence had been used against him.

Safeguards of the kinds suggested here reflect the attitude of the founding fathers. They provide that no single branch of government should be left free to carry on activities which may abuse the rights of Amer-

ican citizens. They provide for checks and balances: for a judicial review of the actions of the executive branch based on standards specified by the Congress in legislation. They proceed from the view which the founding fathers well understood that one could not trust the patriotism of particular individuals as a safeguard of constitutional rights, but rather one must depend on rigorous limitations on the power of any branch or any individual based on clearly defined legal standards.

A set of standards has been sketched here which should be applied to national security wiretapping in a way which would permit the intelligence services to gather information, if indeed it is useful and valuable to the national security of the United States, while safeguarding the constitutional rights of American citizens. Such an approach would demonstrate once again that, as the Supreme Court once stated in passing and as the Justice Department is fond of quoting, the "Constitution was not a suicide pact." This does not mean, as the Justice Department has often failed to note, that constitutional rights can be swept aside whenever the president feels it is necessary in order to pursue his policies. Rather it means that the Constitution was written in a way that permits the Congress and the executive branch together to protect the national security of the United States without violating those very constitutional rights and procedures which our national security agencies are entrusted to defend against foreign enemies.

A Personal Afterward

For some years I have been told often that since I was never in the military I lack the necessary experience to have views on the subject. Now, when I comment on wiretap questions, the suggestion of bias is raised: "Having been wiretapped, can you really speak objectively on the subject?" The temptation to assert that only one who has

read his own wiretap logs is in a position to have a view on the subject is sometimes too strong to resist. It should, of course, go without saying that analyses and proposals should be discussed on their merits without regard to the possible motives or biases of the writer.

My article may strike some as impersonal. Indeed it was so intended: not a jotting from an unwritten memoir but rather an article on warrantless wiretapping designed as a contribution to an important policy debate. Here I take the opportunity to add a few observations from the viewpoint of a tappee.

One question often put to me is: Why do you think it went on for so long? The facts briefly: the wiretap of my home telephone was installed on May 9, 1969. I resigned from the NSC staff over the strong protest of Henry Kissinger on September 20, 1969. The electronic surveillance continued until February 12, 1971. After I left the government the surveillance picked up information on a variety of subjects including preparations for an article by Clark Clifford on Vietnam, lobbying for the Hatfield-McGovern Amendment to cut off the funds for the war in Vietnam, my wife's views on Supreme Court Justice nominations, and some foreign policy aspects of the Muskie campaign.

If the purpose of the surveillance were to determine if I were the source of leaks so that I could be fired or cut off from access, it made no sense at all to continue the surveillance after I left the government. I was no longer being given access to classified material and it is not clear what would have been done had the wiretap revealed that I was discussing classified information. Nonetheless, the wiretap remained on while others were taken off.

In fact, according to the FBI records, Kissinger ordered the tap continued just as he was reluctantly accepting my resignation and ordering other taps removed. Kissinger has denied any role in removing any of the wiretaps. The ambiguity over this issue shows

the danger of permitting such intrusions without judicial supervision.

The Court of Appeals for the District of Columbia in a footnote in the *Zwebbon* decision commented that if a warrant had been required for such taps the Justice Department would probably not have had the audacity even to request the surveillance. Even if it had and the warrant were granted, periodic renewals would have been necessary. At that time the judge would almost certainly have raised questions: What had been learned relative to the leaks? (Nothing.) Were other methods being pursued to investigate Halperin or to track these leaks? (None.) What else was being learned that the executive had no business knowing? (Plenty.) Were any privileges such as that of communications between husband and wife being violated? (Yes.)

In the absence of a warrant none of these questions was asked, and the surveillance went on with no one taking formal responsibility or having to justify the decision.

From September 1969 when I left the NSC staff until May 1970 when the United States invaded Cambodia, the surveillance of my home phone continued, but to little purpose. More than 25 per cent of the conversations during this period were between me and my wife and another 40 per cent or so were her conversations with others (these same ratios hold up for the entire 21-month period). The remaining 25 per cent of my conversations with others were by any standards innocuous except for one conversation in December about a planned Clark Clifford article on Vietnam.

Then came the Cambodian invasion, my resignation as an inactive consultant on the NSC staff, and my involvement in antiwar activity. From May 1970, the White House interest in my phone calls is easier to understand. FBI Director Hoover was summoned to a meeting with President Nixon and brought with him a summary of what had been learned recently from the wiretap. The brief included the following:

We learned through these sources that Halperin, who was serving as a consultant to the National Security Council, planned to resign to protest the invasion of Cambodia. He subsequently did resign. During conversations with other individuals Halperin indicated that he feels the president intends to attack North Vietnam and Laos and agreed to work with Senator Fulbright (D-Arkansas) in opposing the war. Halperin also stated he had contacted Kunstler, who may be identical with William Kunstler, the attorney for the individuals recently convicted for violation of the antiriot laws at Chicago, Illinois. Kunstler allegedly is willing to join an "organization," being formed by Halperin and other individuals.¹⁰

From then on the letters reporting on the surveillance went to Haldeman and gave him some insight into the antiwar movement. Later they supplemented the much fuller reports on the Music campaign gained from the tap on Tony Lake's phone.¹¹

The surveillances finally came off when Hoover threatened to tell the Congress about them. The files relating to the surveillance were later stolen from the FBI so that Hoover could not use them to blackmail the president.

The explanation for why the surveillance continued so long is in the end quite simple. From time to time something of interest was learned and there was no cost. In Watergate days it seemed inconceivable that word of the surveillance would ever leak out. The mistake was in giving such broad power and discretion to executive branch officials. This is why the founding fathers insisted that warrants from a magistrate be required before there could be a search and seizure. Where the "thing" to be seized is

¹⁰ Actually, the person I had contacted was Clark M. Clifford. The reports based on the surveillance contain numerous inaccuracies of this kind.

¹¹ Lake and I have both brought suits for civil damages as have a number of individuals who were subjected to surveillance as part of the FBI's program of courtless wiretaps, or a list of these suits and their current status are Christmas, M. Farwell, "Warrantless National Security Wiretaps," First Principle, newsletter of the Project on National Security and Civil Liberties, vol. 1, no. 2, October 1973.

information, the need for a warrant is even more urgent.

The lawsuit that Ina and I and our three sons—David, Mark, and Gary—filed was brought to permit the court to reaffirm the same principle for government officials and newsmen. It is not a vendetta against anyone but a reaffirmation of the Bill of Rights. We are confident that when it is over, American citizens will have just that much more freedom while the executive retains the power it needs to protect us from foreign dangers.

"WHEN PEOPLE SAY WE'RE STILL WIRETAPPING IT MAKES ME SO MAD I FEEL LIKE TALKING RIGHT BACK TO THEM"



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