

Wiretaps and the Constitution

Feb 12/1976

ONE OF THE GREATEST legacies of the Nixon years is something that former President Nixon hardly meant to promote. That is the growing body of law affirming that no public official, including the President himself, may violate the Constitution with impunity.

The latest decision bolstering this basic tenet of restrained, accountable government was handed down the other day by U.S. District Court Judge John Lewis Smith Jr. The case involved one of the 17 warrantless wiretaps that the Nixon administration carried on, ostensibly in search of security leaks, in 1969-71. Judge Smith upheld the claim of Morton H. Halperin, a former National Security Council staff member, that Mr. Nixon, former Attorney General John N. Mitchell and then-White House chief of staff H.R. Haldeman had violated the constitutional rights of Mr. Halperin and his family by allowing the tap on their home phone to continue without justification for 21 months. Besides finding a President's conduct unconstitutional—a landmark ruling in itself—Judge Smith also ruled that Messrs. Nixon, Mitchell and Haldeman must pay damages to the Halperins for invading their privacy. This is apparently the first time that a President has been held personally liable as a result of improper conduct in office.

The ruling, which is bound to be appealed, is equally noteworthy for what the judge did not decide. Because of "the confused state of the law" on national-security wiretaps in 1969, Judge Smith declined to hold that Mr. Nixon and his associates, including Secretary of State Henry Kissinger, had acted illegally by initiating the Halperin tap. In an ingenious step around a legal morass, the judge found that the *continuation* of the tap was clearly unconstitutional. Even in national-security cases, he ruled, a

President and his associates are bound by the Fourth Amendment's requirements that wiretaps must be carefully limited, reviewed and justified. The tap on the Halperins was just the opposite. It became a "dragnet," conducted with no regard for proper procedures and continued for political purposes long after Mr. Halperin had left the government.

In accord with this approach to the case, Judge Smith dismissed Mr. Halperin's suits against Dr. Kissinger and several others who—whatever their roles in initiating the wiretaps or concealing the records—were not directly responsible for how the tap was carried on. The decision is thus something short of a total judgment on the whole shameful episode. That is not grounds for criticism, though. The law was extremely murky at the time. And, as the record of this long controversy shows, the facts of the matter were so difficult to get at that they may never be entirely straightened out.

For all of that, Judge Smith's decision is another blunt reminder that even when national security is invoked, the nation's top officials do not enjoy a general exemption from constitutional constraints. It is a good reminder, too, of the importance of subjecting all surveillance—especially electronic types—to strict statutory controls and dispassionate judicial review. As Associate Justice Lewis Powell wrote a few years ago, "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." That is exactly what happened here. While the courts may impose damages for past abuses, it is still up to Congress to decide what the future controls should be.