NYTimes

9 Apr 71

)AY, APRIL 9, 1971—

WHITE HOUSE VIEW OF WIRETAP RIGHT DENIED ON APPEAL

U.S. Court Finds No Inherent Power to Eavesdrop on Radical Organizations

By FRED P. GRAHAM

Special to The New York Times

WASHINGTON, April 8—A Federal Court of Appeals rejected today the Nixon Administration's assertion that Federal agents may legally wiretap radical groups without court approval.

Declaring that there was not "one written phrase" in the Constitution or statutes to support the Justice Department's view, the United States Court of Appeals for the Sixth Circuit in Cincinnati ruled that Government wiretapping of such groups without warrants violates the Constitution.

The ruling was the first one by a Federal appellate court on Attorney General John N. Mitchell's contention that the executive branch has the inherent power to evesdrop on "dangerous" groups that he considers a threat to the Government.

Appeal to Top Likely

The Justice Department is expected to appeal the decision to the Supreme Court. It has conceded in several prosecutions involving militants that eavesdropping was used without court approval. However, a spokesman said that no final decision could be made today because there had not been sufficient time to study the decision.

Today's ruling upheld a decision made by Federal District Judge Damon J. Keith in Detroit, in the trial of three members of the White Panther party who were accused of conspiracy in the bombing of a Central Intelligence Agency office in Ann Arbor.

The Government conceded that it had overheard conversations of one of the defendants, Lawrence R. Plamondon, over a wiretap that was approved by the Attorney General but not by any court.

Implied Power Alleged

In an affidavit, Mr. Mitchell made the assertion, which had not been made by any previous Attorney General, that the executive branch had the inherent power to use wiretapping "to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of government."

He said that this authority was implicit in the President's constitutional duty to wage war and protect the country. Thus he said that the wiretap had been a legal one and that the Justice Department did not have to disclose the overheard conversations to Mr. Plamondon.

Judge Keith ordered the Government to disclose the material or drop the case. The Justice Department asked the Sixth Circuit court to overturn that de-

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cision, which it refused to do today by a 2-to-1 vote.

The majority opinion was by Judge George C. Edwards Jr. and was joined by Chief Judge Harry Phillips, it held that the Fourth Amendment's prohibition against unreasonable searches and seizures requires Government agents to obtain warrants to wiretap domestic radicals, just as in any other criminal investigathe land."

Judge Edwards cited the "historic role of the judiciary to see that in periods of crisis, when the challenge to constitutional freedoms is greatest, the Constitution of the United States remains the supreme law of

He noted the Government's assertion that the "awesome power sought for the Attorney General will always be used with discretion," but he said that "even in very recent days" this has not always been the case.

The opinion dismissed the Government's "inherent power" claim, stating that the Supreme Court had said that no such Presidential powers exists when it ruled that President Truman had illegally seized the nation's steel mills in the Korean War period.

The court noted, however, that it did not decide one way or the other as to the President's wiretapping powers where attacks, espionage or sabotage by a foreign power or its agents were involved.

In his dissent, Judge Paul C. Weick said that the President had the sworn duty "to protect and defend the nation from attempts of domestic subversives, as well as foreign enemies, to destroy it by force and violence." He said that the threat to the Government was as great when mounted by a domestic group and that such groups may be aided and abetted by foreign powers.

William M. Kunstler, cor menting on the ruling, said:

"I hope that this decisic means that the Federal cour are going to stand in the wa of the wholesale erosion of th Fourth amendment by the Mi chells, the Hoovers and th other high and low place snoopers."

Mr. Kunstler, the New Yo lawyer, represented Mr. Plan ondon in the case decided t day.