

WXPPost SURV JUN 24 1975

Court Curbs President on Wiretapping

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The President does not have the authority to wiretap a domestic organization without court approval even if the surveillance is undertaken in the name of foreign intelligence gathering for national security purposes, the U.S. Court of Appeals ruled here yesterday.

The court ruled unconstitutional and illegal such warrantless wiretaps, which have been authorized by Presidents for more than 30 years as necessary to protect the United States against threats to national security involving foreign powers.

Yesterday's ruling involved such a warrantless wiretap placed on the Jewish Defense League's New York headquarters for 200 days in 1970 and 1971 when the militant group's anti-Soviet activities in this country were creating diplomatic tensions between the United States and the Soviet Union.

The federal government had maintained that the surveillance was legal because it was "authorized by the President of the United States, acting through the Attorney General in the exercise of his authority relating to foreign affairs and was deemed essential to protect this nation and its citizens against hostile acts of a foreign power and to obtain foreign intelligence information deemed essential to the security of the United States."

The court ruled yesterday, however, that then-Attorney General John N. Mitchell should have gotten court approval for the wiretap, since it was being installed on a domestic organization that was neither the agent of nor acting in collaboration with a foreign power.

The appellate court's finding, unless overturned on a possible appeal to the U.S. Supreme Court, thus will expand into a new area the necessity for court approval of national security wiretaps. Government attorneys said they had no comment pending further study of the 130-page opinion.

The Supreme Court ruled three years ago that court approval is necessary before a wiretap can be placed on a domestic group or individuals under the President's power to protect domestic security. However, that ruling specifically left open the question of whether a judge's approval was necessary before the President could authorize a wiretap in so-called "foreign security" cases.

Yesterday's controlling opinion by the divided eight-member court, although clearly indicating a desire that all wiretaps receive prior approval, left open the specific question of whether wiretaps on foreign groups or suspected foreign agents must also be submitted to a judge for approval.

For example, it was unclear whether the federal government could wiretap a foreign embassy or a group with known foreign ties such as the U.S. Communist Party without a warrant.

"Indeed, our analysis would

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suggest that absent exigent circumstances, no wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought," wrote U.S. Circuit Court Judge J. Skelly Wright in the controlling opinion by four judges that found warrantless wiretaps such as that on the JDL unconstitutional.

However, the judges said there was no reason to make their finding broad enough to cover foreign agents and groups.

They noted that "we are only presented with a case in which foreign threats or retaliation against individual citizens abroad were provoked by the actions of the domestic organization which was subsequently wiretapped, rather than a case in which the wiretapped organization acted in collaboration with, or as the agent of, the foreign power from which the threat emanated."

The President's power to authorize wiretaps without court approval must be closely controlled, the judges said, because it is "susceptible to abuse and endangers those fundamental personal liberties which the government was instituted to secure for its citizens and whose exercise elevates the nation to a status worthy of defense."

Agreeing with Judge Wright were Circuit Court Judges David L. Bazelon, Harold Leventhal and Spottswood Robinson III.

The four judges also agreed that such national security wiretaps are controlled by federal statutes passed in 1968, and that subjects of such wiretaps can thus sue for damages under the civil penalties against illegal wiretapping included in those statutes.

Yesterday's ruling also appears to apply directly to the

so-called "national security" wiretaps placed on government officials and newsmen during the Nixon administration's attempts to find persons who were allegedly leaking classified information to the press.

The government has asserted in defenses to various pending lawsuits growing out of that wiretap program that the surveillances were legal because they came under the President's authority to protect national security under the same general "foreign affairs" exemption cited in the JDL case.

U.S. Circuit Court Judges Carl McGowan and Roger Robb concurred in the results of the opinion, which ruled the taps illegal, but said they would set the taps aside on the statutory grounds alone and not on constitutional grounds.

U.S. Circuit Court Judge Malcolm Wilkey, meanwhile, agreed with the results of the opinion on constitutional grounds alone, and not on statutory grounds. He said, however, that the President may have the authority to order wiretaps on foreign groups and agents without any prior judicial approval.

U.S. Circuit Court Judge George MacKinnon dissented from the majority opinion's results, but said he agreed with Judge Wilkey that the President did not need judicial approval to tap foreign agents and groups.

The taps had been ruled legal by U.S. District Court Judge John H. Pratt, who found that they were reasonable in light of the JDL's activities here.