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The 17 Wiretaps

James St. Clair is too able a lawyer to argue, as others in the administration have done, that the 17 wiretaps, without warrants, of government officials and members of the press in 1969-71 were legal at the time and remained so until the Supreme Court in 1972 determined that warrantless wiretaps for "internal security" were illegal. Rather, the President's Special Counsel, in his brief to the House Judiciary Committee dated July 19, asserts that: "The 17 wiretaps were legal then and still meet the current legal standards." By "current legal standards" Mr. St. Clair is referring to the fact that the 1972 Supreme Court decision did not invalidate "national security" wiretaps.

I disagree with Mr. St. Clair's assertion that the wiretaps in question would fall within the Supreme Court's present definition of national security wiretaps—that is wiretaps directed at "foreign powers or their agents." Let me turn first, however, to the contention that the 17 wiretaps were legal when installed and remained so until the Supreme Court ruling of 1972.

There is no basis in legal theory or in precedent for this contention. In 1967, in the *Katz* case, the Supreme Court held that wiretaps are searches, subject to Fourth Amendment standards. Responding to this decision, Congress in 1968 enacted a law, the Omnibus Crime Control and Safe Streets Act, which, among other things, set forth detailed safeguards and procedures for obtaining prior court authorization for wiretaps. The crimes in connection with which such taps were authorized embrace serious federal offenses such as espionage, treason, murder, kidnapping and narcotics offenses. It has become the fashion to refer to these offenses as involving only domestic security, but as is apparent from their recital, the law extends beyond this category to espionage and treason, which do involve foreign powers.

In 1972, the Supreme Court, in *United States v. United States District Court*, a unanimous decision, affirmed decisions of the District Court and the Court of Appeals for the Sixth Circuit holding that wiretaps authorized by the President through the Attorney General in internal security matters, without prior judicial approval, were illegal. In this unanimous holding, the Supreme Court did not make illegal what was previously legal; it affirmed decisions of the lower federal courts holding warrantless wiretaps authorized by the President in internal security matters to be unlawful and illegal when made. In the particular case before the Supreme Court, the wiretaps at issue took place before 1970.

In its ruling, the Supreme Court dismissed the argument made by the government that past practice of other Presidents authorizing similar wiretaps made the challenged wiretaps legal. In so holding, the Court gave expression to the doctrine that mere executive practice, unsupported and unendorsed by Congressional statute or prior court ruling, does not make illegal conduct lawful.

There are other principles of law which likewise negate the notion of "legal then and illegal later only when the Supreme Court so decides."

An Act of Congress, such as the wiretap provisions of the Omnibus Crime Control and Safe Streets Act, is presumed to be valid and applicable unless and until the Supreme Court determines otherwise.

In the 1972 case, the Supreme Court did not determine otherwise; it sustained the validity of the Omnibus Crime Control and Safe Streets Act and construed it to prohibit warrantless wiretapping authorized by the President in internal security matters and applied its holding to wiretaps antedating its decision.

The National Labor Relations Act was strenuously challenged at the time of its adoption in 1935. Its constitutionality was sustained by a narrowly divided Court in 1937 in the *Jones & Laughlin* case. Were employers, who had been advised by eminent counsel that their failure to comply was legal because the act was unconstitutional, immunized from liability for all violations until the Supreme Court two years after the enactment of the Act held it constitutional? Quite the contrary. Following the Supreme Court decision confirming the validity of the Act, employers who had taken the risk of non-compliance during the period of litigation were held liable not only to reinstate employees discharged in violation of the Act, but for back pay for non-compliance.

In 1932, Congress enacted the Lindberg Act, making kidnapping across state lines a federal offense. Is it arguable that kidnappers had a federal license to kidnap, notwithstanding the statute, until the courts sustained the validity of this Act? Yet the contention that the wiretapping in question was legal in 1969 after Congress outlawed it and became illegal only in 1972 when the Court interpreted and sustained the statute would, if adopted, lead to the incongruous result of the kidnapping illustration.

It is correct that in a limited class of cases the Supreme Court has made its decisions prospective only. These however, basically are cases where the Court has overruled its own decisions and, therefore, has deemed it unfair and impractical to apply its reversals retrospectively. Illustrative are cases where the Court has declined to apply a new standard of police conduct to past action clearly consistent with its prior decisions. Even in these cases, there has been sharp division in the Court about this departure from the usual rule against making decisions prospective only.

For these reasons it seems to me that the contention that the 17 wiretaps were legal until tthe Supreme Court declared otherwise in its 1972 decisions is completely untenable.

An equally unconvincing argument is that made by Mr. St. Clair in his brief, namely, that the wiretaps are legal even under the 1972 decision because they "involve national security" and, therefore, the President had — and still has the right to authorize such taps without a warrant. The fallacy of this argument is that the 1972 opinion of the Supreme Court effectively refutes it as applied to the 17 wiretaps. In the 1972 decision, Justice Powell, who wrote for the Court, reserved decision as to foreign intelligence wiretaps. He defined these, however, in terms which undermine Mr. St. Clair's claim of an inherent power of the President to authorize the wiretaps in question. Justice Powell did not rule on wiretaps involving "directly or indirectly a foreign power," but he made it clear that the 1968 statute requires a warrant to wiretap any individual or group "which has no significant connection with a foreign power, its agents or agencies."

In light of all the evidence in the public record, it seems clear that none of those wiretapped had any "significant connection with a foreign power" — Justice Powell's standard.

This is not to say that the establishment of the taps, if actually done in good faith on advice of counsel, may warrant imposition of the criminal penalties provided by the 1968 statute.

It is to say, however, that the taps were illegal when made, that their illegality was not established but rather confirmed by the Supreme Court in 1972, and that the "national security" argument in defense of the taps is not sustainable.

It is also to remind ourselves that wiretapping, in general, is a "dirty business" and strikes at the panoply of protections which our Constitution erects around the privacy of a citizen. Privacy, the ability to be confident of security in our homes and our conversations, is not only the bedrock of individual freedom; privacy of communication is the essence of democracy. For, if we cannot speak to each other without government eavesdropping, we soon will not be able to speak to each other without government permission.

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