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Mitchell and the Wiretap

By MICHAEL I. SOVERN

Attorney General John Mitchell is again asking the courts to give the executive branch the final say on when the Bill of Rights must bend to national security.

In the coming Supreme Court confrontation between the Bill of Rights and the executive, the Attorney General is asserting the right to wiretap and, apparently, to engage in any form of electronic surveillance whenever he, in his sole discretion, believes surveillance "necessary to protect against attempts to overthrow the Government by force or other unlawful means or against other clear and present dangers to the Government's structure or existence." Again the claim leaves no room for judicial review of the correctness of the Attorney General's judgment: if he decides to wiretap, the F.B.I. may plug in without more. When the Supreme Court reconvenes in the fall, it will have to test this claim against the Fourth Amendment's ban on unseasonable searches and seizures.

The omnibus Crime Control and Safe Streets Act of 1968 makes extensive provision for wiretapping under judicial supervision. Federal courts are expressly authorized to issue wiretapping warrants at the request of the Attorney General. The key requirement: that "there is probable cause for belief that an individual is committing, has committed, or is about to commit" any one of a long list of crimes. When the Attorney General "reasonably determines that an emergency situation exists with respect to conspiratorial activities threatening the national security interest," he may tap first and seek a court order later—within 48 hours after tapping has begun. Thus, the power to act in emergencies to safeguard national security is preserved, but so is the judicial power to correct abuses.

The omnibus act also declares that its wiretapping provisions shall not limit "the constitutional power of the President" to protect the nation from foreign powers, from overthrow of the Government by unlawful means, and from "other clear and present danger to the structure or existence of the Government." The Justice Department relies heavily on this provision, but it merely leaves unimpaired whatever constitutional power the President has. It obviously cannot add to that power: only a constitutional amendment could have that effect.

Equally obvious is the proposition that "the constitutional power of the President" to wiretap is subject to the Fourth Amendment.

This has been clear since 1967, when the Supreme Court, in *Katz v. United States*, held that the Fourth Amendment's ban on unreasonable searches and seizures applied to wiretaps. But *Katz* itself specifically reserved for later decision the question "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security. . . ."

The Justice Department now argues that the Attorney General is a satisfactory safeguard. The main reliance, though, is on necessity, on the risk to the nation from any other course. In lower court arguments, the department has emphasized the President's considerable authority over foreign affairs. Many who would grant the Government unilateral authority to wiretap in the extralegal realm of espionage and counter-espionage will not take the next, giant step urged by the Attorney General—that the threat to national security from domestic enemies is at least as serious as that from foreign powers and so similar surveillance measures must be allowed.

In essence, the Government is arguing that the Fourth Amendment permits reasonable searches without warrants and that a wiretap ordered by the Attorney General in the interest of national security is a reasonable search. The argument is vulnerable on two grounds.

First, on the extent to which searches without warrants are permissible, the Supreme Court has said: "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specific established and well-delineated exceptions."

Second, the claim that the Attorney General may make the final decision on what political movements should be subject to eavesdropping as threats to national security is on its face unreasonable. The Attorney General is always the nation's chief law enforcement officer. In the last decade, two attorneys general have, in addition, been Presidential campaign managers. It is against this background that the Supreme Court must determine whether the Attorney General is the organ of Government to which we should entrust final authority to secretly decide whose wires may be tapped. To reject the claim is not to impugn the integrity of individuals: it is to recognize the temptations of office. However incorruptible any particular person may be, we do not entrust our privacy to the unreviewable discretion of policemen and politicians. As a recent applicant for admission to the bar in New York submitted, "Above all else, the framers of the Constitution were fearful of the concentration of power in either individuals or government." The applicant was Richard M. Nixon.

Michael I. Sovern is dean of the faculty of law at Columbia.