NYTimes

15 Jun 71

JUN 15 1971
THE NEW YORK TIMES

Bad Policy, Bad Law

By TOM WICKER

IN THE NATION

WASHINGTON, June 14—Attorney General Mitchell has attempted to describe to the Virginia Bar Association the "firm legal basis" which he says underlies the doctrine that the Government has the unlimited right to tap the telephone conversations of anyone it considers a threat to the national security. The Supreme Court will be the ultimate judge of his case, but those who have argued that unauthorized "national security" wiretapping is bad policy and a threat to liberty ought also, in fairness, to deal with Mr. Mitchell's "legal basis."

His first contention—at least in a layman's analysis—is that there is no distinction between the threat of a foreign power, or of its agents, and the threat of a "domestic" organization, or individual, to the security of the nation. One is as dangerous as the other, Mr. Mitchell said, and the domestic variety, if anything, is more dangerous.

In fact, the distinction is plain, or ought to be, between a security threat that might be posed by an American citizen, or a group of them, and one that might be posed by a foreign power. There may be a general assumption that the Government has the right to take certain security measures against the Soviet Union, with all its missiles; but why should that justify it in taking the same measures against the Black Panthers, or the Chicago Seven, or a nun?

Mr. Mitchell also argued in his Virginia speech that national security wiretapping was not "unreasonable" and was therefore permissible under the Fourth Amendment. He based this view—again, in a layman's analysis—on three interlinked assertions.

The first was that Congress, in the omnibus crime act of 1968, had "carefully avoided imposing the warrant requirement in national security cases by including a provision in the statute which explicitly recognizes the President's authority to conduct such surveillances."

In fact, the act says first that nothing in it "shall limit the constitutional power of the President" to act as necessary to protect the national security against activities of foreign powers. Then the next sentence—drawing the very distinction Mr. Mitchell denies—says that nothing in the act can "be deemed to limit the constitutional power of the President" to act as necessary to prevent the overthrow of the Government or guard against a "clear and present danger" to its structure or existence.

That language is by no means a grant of power not previously known, and all it "explicitly recognizes" is that whatever constitutional power a President might already have is not limited by the act. By no stretch of the imagination does it positively authorize Mr. Mitchell's doctrine of unlimited authority for national security taps.

Mr. Mitchell further contended that the President had more information on and better understanding of national security issues than any judge; hence, it served the security interests of the nation better if the President, rather than a judge, authorized a security tap.

This contention, if granted, would give an elected political official, rather than the courts, the right to determine what is reasonable under the Fourth Amendment. It would also give the President means of circumventing what the statutes otherwise require—that the fact of a legal wiretap, and sometimes its contents, must ultimately be disclosed to the victim. It would give the executive branch a license to tap anyone, not just foreign agents, without ever disclosing or justifying to anyone the fact that it had done so. If that isn't an unreasonable search, what is?

But Mr. Mitchell argued, finally, that such powers were inherent in the President's oath to "preserve, protect and defend" the Constitution; without them, that is, he could not carry out his oath.

The Supreme Court dealt with exactly this contention in 1952, when it rejected President Truman's seizure of the steel industry, which he said was necessary to carry out his duties as Commander in Chief and Chief Executive. Finding no express, written authorization for such a seizure in the Constitution or in the statutes—as there is none for the kind of wiretapping Mr. Mitchell advocates—the Court concluded that there had been ample opportunity for Congress to give the President such power, but it had not done so; hence, for him to exercise it on his own initiative was unconstitutional Presidential "lawmaking."

Mr. Justice Frankfurter clinched the point in a concurring opinion: "Absence of authority in the President to deal with a crisis does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President."

That is the right answer to Mr. Mitchell. If the President does need the power claimed, let him go to the constitutional lawmakers and ask for it.