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Civil Liberties (ACLU, New York)

USES, COSTS, RESULTS:
Government Wiretapping

The ACLU in December issued a report concluding that government electronic eavesdropping has been highly extensive, expensive and ineffective.

The 46-page detailed analysis of government figures on electronic surveillance, "A Report on the Costs and Benefits of Electronic Surveillance," was prepared for the ACLU by Herman Schwartz, professor of law at the State University of New York at Buffalo, who has been ACLU counsel in several major legal challenges to wiretapping. Professor Schwartz's summary of his findings follows. The report is available for $1 from the ACLU national office.

Amount of Surveillance

1. There is a vast amount of electronic surveillance, which is not covered by the figures submitted. These fall into two categories:

(a) National security (domestic and foreign);

(b) One-party consent bugging where an informant is wired for sound and police listen in.

(a) National security surveillance involves a great many taps and bugs, on many, many people, over long periods of time; the total number per year is completely unknown, so that comparisons with court-ordered eavesdropping are difficult; however, virtually every prosecution of someone whose politics are distasteful to the government seems to turn up a national security tap or bug.

(b) The one-party consent eavesdropping is perhaps the most widely used form of electronic surveillance, and unlike the national security surveillance, is used on the state as well as federal level.

2. Tens of thousands of people are reported to have been overheard by federal agents in hundreds of thousands of *reported* surveillances, many if not most of whom are quite innocent, *not including* the substantial amount of national security eavesdropping which inevitably involves a great many people per surveillance, nor the one-party consent surveillance. It is not clear that quite that many separate individuals were overheard because one cannot know from the figures whether there was any duplication so that the same person was recorded on several orders.

The totals for 1968-1970 are:

Year	Orders	Installations	People	Conversations*
1968	174	147	4,312	66,716
1969	302	271	31,436	173,711
1970	597	583	25,652	381,865
Totals	1,073	1,001	61,400	622,292

In addition, there were an additional 171 federal installations by June 14, 1971.

The breakdown is as follows:

(a) *In 1968,* when there was no federal eavesdropping, state officers overheard 4,312 people in 66,716 conversations in a reported figure of 147 installations.

(b) *In 1969, federal* officials overheard 4,560 people in 44,940 conversations on 30 installed surveillances out of 33 authorizations.

State officials overheard 26,876 people in 128,771 conversations on 241 installed out of 271 authorized surveillances.

The *total* was 31,436 people in 173,711 conversations.

(c) *In 1970, federal* officers overheard 10,260 people in 147,780 conversations in 180 installations out of 183 authorizations.

State officers overheard 15,392 people in 234,085 conversations on 403 installations out of 414 authorizations.

The *total* was 25,652 people in 381,865 conversations on 583 installations and 597 authorizations.

(d) *In 1971,* the projected *federal* surveillance is about 375-400 installations which at the 1970 average people and conversations per tap, may result in overhearing about 21,000 people on 300,000 conversations.

Comment

1. We don't know how many people and conversations were overheard in security or one-party consent eavesdropping.

2. There are some unexplained peculiarities in the figures, raising doubts as to accuracy.

3. Indeed, we know so little about how well the reporting has been monitored, and the history of self-reporting by police and other enforcement agencies is so poor, that the figures must be taken with scepticism, particularly such subjective items as "incriminating," see below.

4. Contrary to Mr. Justice Lewis Powell's statement, federal officers did not eavesdrop almost exclusively in murder, kidnapping, extortion and narcotics cases. In 1970, federal officials eavesdropped on *no* homicide or kidnapping cases and in 1969, on only *one* kidnapping case. In 1970, federal officials eavesdropped in 119 gambling cases, 40 narcotic cases, 16 credit extortion cases, and a few miscellaneous items. The state effort is also overwhelming for gambling.

The Results of This Surveillance

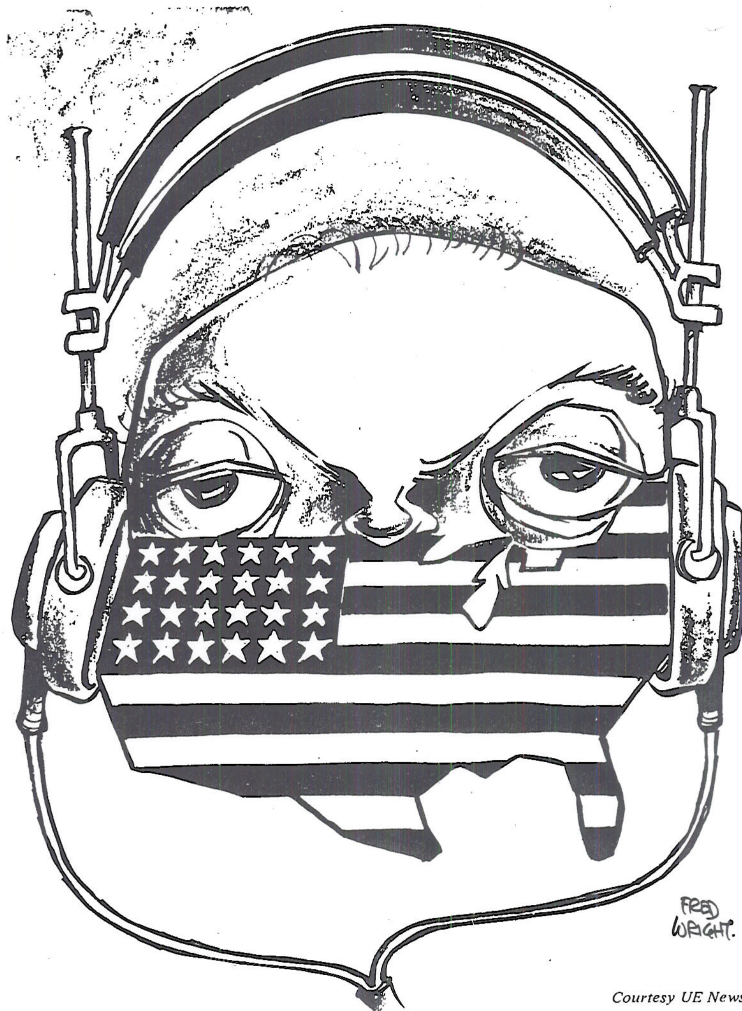
(a) *In 1968, state* eavesdropping produced *no* reported convictions, 268 arrests and 15,464 incriminating conversations out of the 4,312 people and 66,716 conversations overheard.

(b) *In 1969, federal* eavesdropping produced 24 convictions, 139 arrests and 36,840 incriminating conversations out of the 4,560 people and 44,940 conversations overheard.

In 1969, *state* eavesdropping produced 80 convictions, 486 arrests and 31,452 incriminating conversations out of the 26,876 people and 128,771 conversations overheard.

(c) As of the report's closing date (12/31/70), in *1970 federal* eavesdropping had produced 48 convictions, 613 arrests and 102,780 incriminating conversations out of the 10,260 people and 147,780 conversations overheard. An interesting breakdown is that for the 21 non-gambling and non-drug cases, the results were 6 convictions in one counterfeiting case, 27 arrests (7 in one case related to another tap and 10 in another) and 1,193 incriminating conversations out of 1,214 people and 5,966 conversations

**I have been informed by the Administrative Office of the U.S. Courts, which compiles and issues the figures, that an "intercept" in the Report refers to a conversation.*



Courtesy UE News

overheard in these cases. Even in the gambling area, there were some 18 cases where no arrests were made, and where 1,760 people and 6,122 conversations were overheard, with only 215 of the conversations considered incriminating.

As of the report's date (12/31/70) in 1970, *state* eavesdropping produced 103 convictions, 1,261 arrests and 71,069 incriminating conversations out of the 15,392 people and 234,085 conversations overheard.

Comment

1. The percentage of convictions per people overheard is so small as to be virtually *de minimis*: In 1968, no reports; in 1969, 106 convictions out of 31,436 people overheard or about 1/3 of 1%; in 1970, as of 12/31/70, 151 convictions out of 25,652 people, or a little better than 1/2 of 1%. So far – and the reports are admittedly not all in yet – 257 convictions reported for 61,400 people overheard, again not counting national security or one-party consent surveillance.

2. With respect to the *reported convictions, we cannot know,* except from self-serving Justice Department statements, whether the electronic surveillance was necessary or even helpful in the cases where it was used, even if convictions resulted – we only know that the surveillance was *associated* with the result.

3. *Arrests* are a very inadequate measure of effectiveness, since relatively few arrests ultimately produce convictions, and arrest figures are inherently unreliable.

4. The number or percentage of "incriminating" interceptions is of little to no value, since it is a highly subjective judgment and has no inherent significance. Even here, however, the percentages for non-drug, non-gambling and state cases are very low.

5. Since it seems clear that gambling and drugs cannot either be stamped out or freed from criminal entanglement merely by law enforcement techniques, is it worth allowing such a gross invasion of privacy? Indeed, all reports are to the effect that drug supplies have not substantially declined despite the increased law enforcement and electronic surveillance, and the battle against gambling has always been a failure.

The Costs of this Surveillance as Reported, Unreported and Misreported

(a) In 1968, the state surveillance was too incompletely reported to derive useful cost figures.

(b) In 1969, federal surveillance was reported to cost $265,650 and state surveillance about $415,000, or a total of $680,650.

(c) In 1970, federal surveillance was reported to cost over $2 million, and state surveillance about $1 million, or a total of $3 million.

(d) In 1971, at the projected rate of 375-400 per year, federal surveillance will cost close to $5 million.

Comment

1. The above figures are *grossly understated,* since they *omit*:

(a) the large amount of national security eavesdropping; and

(b) the vast amount of one-party consent surveillance; and

(c) the enormous amount of man-hours by lawyers, judges and investigators to prepare applications, to keep records and to handle court challenges. The appropriate cost figure for this electronic surveillance effort may be *many times* the 1970 figure of $3 million.

2. There are unexplained cost differences between similar types of eavesdropping, raising questions as to accuracy of the figures. For example, FBI and Strike Force cost figures are much lower than Narcotics Bureau figures; the discrepancies on the state level are so great as to raise serious doubts about giving these figures any value.

BOOK REVIEW:

Radical Lawyers Look at the Legal System

Law Against the People: Essays to Demystify Law, Order and the Courts, edited by Robert Lefcourt, Random House, 347 pages, $10.

By Thomas R. Asher

Why should anyone shell out $10 for a collection of essays in which self-proclaimed "radical lawyers" engage in what, for the most part, are turgid and self-indulgent efforts to define their status and make some sense out of the apparent contradiction in terms between "radical" and "lawyer"? Why, especially in light of the fact that much of the bathos in the book's 347 pages of text involves second-rate political theorizing, inevitably culminating in empty rhetoric about "power to the people"? Why indeed?

Well, for one reason, to glimpse the mental processes of some of the nation's most dedicated lawyers for social change. It is useful to learn of their sense of frustration with and, often, downright hostility toward, the "system" or "establishment," while they at the same time are working within that very system, and invoking its most basic precepts – freedom of expression and due process – to protect the nation's most forceful advocates of drastic and ameliorative social change. One comes away from reading *Law Against the People* with very mixed feelings: agreement with the authors' collective sense of and dedication to the need to rapidly reorder this nation's social and economic priorities and to eradicate class, sex and racial discrimination; admiration for the economic sacrifices which many attorneys are making to assure that the forces of social change, even those whose tactics are questionable, receive fair treatment at the hands of the courts; concern that lawyers for radical leftist clients who share their clients' political beliefs seem totally stymied (with one or two exceptions which I shall discuss later) in their efforts to articulate, in any rational manner, a coherent theory of their professional ideology; and a smug awareness that, while there is certainly a need for radical lawyers of the style whose views appear in this book, there is an even greater need for the stodgy old ACLU, which may be the only national "radical law firm." I make the last remark with a tip of my hat to Joseph Bishop, whose recent attack on the ACLU in *Commentary*, despite much mudslinging and inaccuracy, rightly points out that the ACLU provides the left with far more free legal representation that it does the right. As many of the authors of *Law Against the People* point out, the radical left (including the civil rights movement) is the major target of governmental repression in America today; that is why they receive ACLU assistance.

Catharsis

The materials in the book under review fall into three basis categories: first, attempts to define and describe weaknesses in and malfunctions of the American legal system; second, explorations of the rationale and role of lawyers dedicated to representing persons working for social equality; and, third, economic, jurisprudential, sociological, and historical rhetoric about "the ruling class(es)," "power to the people," "fascism in America," and the like. Perhaps the last, which must account for well over half of the book's length (and all of Florynce Kennedy's gross "The Whorehouse Theory of Law"), is a necessary cathartic – clearing one's spleen before speaking one's mind, as it were. At least the neo-Marxist rhetoric, even in the face of repeated denunciations of confidence in proletarian Marxism, lets us know what *motivates* radical lawyers to practice and preach as they do.

As to the other two types of material contained in *Law Against the People*, there is enough interesting prose to be edited into a slim and worthwhile paperback. The massive amounts of tediously written amateur social science limit the appeal of this book to those with extraordinary patience and interest in the subject matter.

The basic worthwhile theses contained in *Law Against the People* can be (and should, by the editor, have been) concisely summarized: (a) the law is essentially an establishmentarian institution, designed and often used to protect society's established interests; (b) for this reason, the law is and always has been used as a vehicle to oppress the weak and disenfranchised; (c) simultaneously, the law – especially the U.S. Constitution – can be and often is the sole obstacle to widespread governmental and corporate trampling upon the rights and needs of the weaker elements of society; (d) it is possible, therefore, for lawyers to use the law for four "radical" purposes – (1) keeping the people in power honest by requiring that all possible procedural safeguards be interposed between establishment oppressors and the New Left oppressed, (2) keeping radicals out of jail so that may continue organizing for a "people's revolution," (3) using the courts as guerilla theatres in which, with the full consent of his client, the radical lawyer can work to publicize social injustice (and thereby radicalize ever-widening segments of society), and (4) by litigation, legislation and education, working to make the rule and rules of law, substantive and procedural, more equitable, fair and honest.

The People

The basic problem with the approach taken by all but a few of the authors in *Law Against the People* is that they assume that giving power to the people will result in the leveling of social, sexual and ethnic barriers and lead to true equality of both opportunity and economic life in America. With Mr. Nixon's popularity near its zenith despite his unabashed preference for business interests over individual needs, for militarization of our economy and aerial genocide abroad in preference to social equality at home, and for the widespread "law and order" campaigns which are, as the authors repeatedly point out, aimed largely at suppressing dissent from the left, how can anyone feel sanguine about turning over "power to the people," when that term, at least in the eyes of many of the book's authors, represents an undermining of the judicial system as it presently is constituted? I believe that that judicial system, as corrupt, inefficient, discriminatory, and establishment-biased as it often is, is the best guardian that we have in this country of the "people" who both the authors and I want to see achieve power. Nothing in *Law Against the People* demonstrates that the anarchy advocated by some of its authors would result in better treatment for those "people." Those "people" we want to protect and secure better treatment for are truly not only out of power in America today, but if their status were clearly posed in any freely contested election, they would wind up far worse off than they presently are.

Use of Law

Thus, I agree with Arthur Kinoy (whose piece in the book, after some hollow "movement" rhetoric, comes down squarely in favor of radical lawyers' taking a strongly and traditionally "libertarian" approach) and Mike Tigar, that when the smoke clears, the radical lawyer must have his feet firmly planted in the libertarian ethic. Otherwise, lawyers would be of no use to radicals. It is only when the legal institutions function with at least a moderate degree of fairness that lawyers can perform useful roles for their radical clients. The law can and should be used to the fullest extent possible as a vehicle for positive social change and, simultaneously, radical and libertarian lawyers should work tirelessly to prevent the establishments, governmental and private, from using the law as a tool of oppression. But the courts are all that stand between John Mitchell and us, and we'd better be very careful about tearing them down unless we're sure that Mr. Mitchell and his ilk will come down as well.

There are a few truly impressive articles in *Law Against the People*. Haywood Burns' "Racism and American Law" nicely illustrates how deeply racism and oppression of the poor are engrained in the American legal system. Kenneth Cloke, in "The Economic Basis of Law and State," analyses some basic contradictions which underlie our jurisprudence and the often low visibility ways in which law and lawyers become tools of the power elite. George Jackson's famous "Speaking from Dachau, Soledad Prison, California" eloquently indicts America's "criminal justice" system; it is especially poignant because Jackson is perhaps that system's most thorough victim. "The Rutgers Report" analyses a law school striving to be relevant to the urban poor. And Michael Tigar's rambling but often insightful piece on "Socialist Law and Legal Institutions" provides much food for thought about how the law as a statist tool, be it in the hands of a capitalist or socialist state, can work to oppress the "people."

It's too bad that one must wade among so many swine to catch the few pearls.

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HOW REHNQUIST HAPPENED

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unnecessary political debit through "futile" opposition to a presidential nominee. In short, it was too easy to go along with the man in charge.

There were several strategic factors helping Rehnquist: One was President Nixon's extreme good fortune in being able to offer two nominees at the same time. Had either Rehnquist or Lewis Powell been "running" alone, the opposition could have concentrated its efforts. As it was, Nixon kept the two men paired as long as possible, knowing that not even the most dedicated opponents would hope to block two nominees at the same time; he also managed, until the final days, to keep Rehnquist's name tentatively scheduled to be voted on first, on the realistic assumption that psychological pressure would pile up on Rehnquist opponents to shorten the debate lest they be accused of delaying the appointment of Powell. Powell was devoid of virtually all active opposition a few weeks after his nomination, as opponents finally dropped him to concentrate on Rehnquist. Even those few weeks were costly, however, as they delayed the need to establish a sharp focus on Rehnquist.

Enough

Psychology also helped Nixon in that a whole flock of his potential nominees – whose names were leaked and/or announced to the press – had already been "rejected" even before he could nominate them, because they were known to be faring badly even in the relatively staid councils of the American Bar Association. Since there are limits to how many consecutive times a President can be denied, the loss of these early skirmishes (some mistrustful souls believe they were only trial balloons) helped Nixon's allies argue that enough was enough.

Most of all, both Rehnquist and Powell were helped by the fact that neither nomination involved issues on which the general public could easily fix, as they could over the questions of Carswell's competence and racial attitudes, or Haynsworth's conflict of interest. Here the issue was more elusive: civil liberties. It called for a much more sophisticated and painstaking examination of a man's record – and while such an examination obviously did not take place soon enough in a wide enough segment of the population, it was nevertheless a-building, and would have been Rehnquist's undoing had there been a bit more time.

The administration also introduced another tactic to good advantage. Having been burned so often by the surprise surfacing of derogatory information about previous Nixon nominees, the administration this time went first to the source of that material – namely those who had led the opposition research before – both to seek information and, apparently, to unnerve the enemy (the president of Harvard University publicly charged that FBI agents had put a series of intimidating questions to a Harvard law professor whose research had contributed to previous administration setbacks). A unique tactic was tied in with these quizzes: Whenever something negative was learned about Rehnquist, either from his friends or his opponents, the administration quickly made it public. The fact that the derogatory information came from the administration rather than the opposition apparently reduced its shock value and took the tarnish off, regardless of the fact that the truth was just as true, and just as bad, no matter its source.

Public Response

The important point for the future is that the public – despite the nonchalance of the media – *was* becoming educated and *was* beginning to respond. Contrary to the pessimism of many of us, it *is* possible these days to arouse sufficient support to win congressional votes on relatively abstract issues, such as school prayer and other civil liberties questions.

But in the Rehnquist vote, the outcome finally turned on two strategic breaks which unfortunately have nothing to do with his qualifications for the Supreme Court. One was the decision of the Senate leadership to hold firm to what it said was a promise to President Nixon to conduct the vote before the Christmas recess, and the other was the Christmas recess itself. The pressure to adjourn – the basic homing instinct of the political animal finally carried the day.

Ironically, that particular, intangible kind of pressure broke through on the very same day – Friday, Dec. 10 – on which the momentum against Rehnquist had picked up so visibly that his ultimate defeat was in sight for the first time.

This was so because that morning the Senate had rejected a move to close debate on the issue. Opponents of Rehnquist netted 42 votes against cloture. They needed only 34 (one more than one-third of the Senate). On the day before, they were sure of only 25. The other 17 had come aboard in a period of 24 hours, generally on the strength of the argument that far too many questions about William Rehnquist had been left unanswered and should be examined in further debate. The fact that the opposition could muster so many votes in so short a time was a heartening sign.

That morning, moreover, an article by John P. MacKenzie, who covers the Supreme Court for *The Washington Post*, had raised new and serious doubts about Rehnquist's claim that a recently discovered pro-segregation memo, written by

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