NYTimes Surv 15 May 73

MAY 15 1973

The Real Contempt

NYTimes

By Tom Wicker

Senator John L. McClellan, that thunderous pillar of ostensible virtue, recently said that the statistics on two and a half years of court-authorized wiretapping "should do a great deal to relieve the fears of some citizens of an excessive use of these techniques by legitimate law-enforcement agents. . . ."

Mr. McClellan ought to look and think again, since he spoke just before various investigative sources (Senate or Justice Department or F.B.I.) began alleging that:

¶In pursuit of the "Mitchell Doctrine" that the executive branch needed no court authorization to tap suspected subversives or other domestic threats to the national security, the Nixon Administration had ordered unauthorized taps placed not only on news reporters but on some of its own officials.

¶J. Edgar Hoover, bureaucrat to the bone, had not only required authorization in writing before placing these taps but had then threatened to disclose their existence in order to stop Attorney General Mitchell from approving a Senate investigation of the F.B.I., and that Mr. Mitchell then backed off.

¶Richard Kleindienst, then an Assistant Attorney General, also had known of these "security installations" —an allegation Mr. Kleindienst denies —but that records pertaining to them had disappeared.

Topping all this was the disclosure by William Ruckelshaus, the acting F.B.I. director, that a tap on an Administration official had picked up conversations of Daniel Ellsberg during the period covered in his indictment for criminal acts; that the logs of these conversations had disappeared; and that the Justice Department had failed its legal obligation to report these taps to the court trying Mr. Ellsberg, or to the defense.

Senator McClellan and others may contend that all these distasteful events arose from reliance not on court-authorized taps but on the "Mitchell Doctrine," which was subsequently ruled out by the Supreme Court in U.S. v. U.S. District Court. But although Mr. Justice Blackmun's opinion in that case did insist on prior judicial approval even for domestic

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security taps, it also stated that traditional warrant requirements were not "necessarily applicable" to domestic security cases, that the "exact targets" need not be identified, and that such a tap might be necessary just for "preparedness"—that is, for general intelligence purposes, not for solving or detecting a specific crime. In laymen's words, an authorization for a domestic security tap was made easier to get than one aimed at, say, organized crime.

Beyond that, Mr. Nixon's Justice Department has been caught cheating repeatedly even in *applying* for the right to tap somebody's phone. The Omnibus Crime Control Act of 1968 provides that the Attorney General or a specifically designated Assistant Attorney General must personally authorize a wiretap application; but both the Ninth Circuit and the Fifth Circuit Courts of Appeal have found in several cases that Mr. Mitchell allowed lesser officials actually to authorize such applications, and that falsified documents purporting to satisfy the legal requirements then were forwarded to the courts.

As the Ninth Circuit noted, not only did this falsely "create the illusion of compliance with the act", it also directly thwarted Congress's (and Senator McClellan's) intent that a specific official take specific responsibility for a specific wiretap application. As the Fifth Circuit observed caustically, it was "of more than passing significance that the Justice Department fostered a procedure which included ghost-written false and misleading memoranda and letters." Who was supposed to uphold the law and abhor fraud, if not the Justice Department?

But these cases show that the department, instead, systematically subverted the lawful regulations pertaining even to applications for court-authorized wiretaps. The dismissal of the Ellsberg-Russo case and other Watergate disclosures suggest the frightening extent to which unauthorized taps have been used in the past, and U.S. v. U.S. District Court made it easy to get authorization for just such domestic security taps.

In dismissing the Ellsberg-Russo case, moreover, Judge Matthew Byrne found that the Government's general behavior had been so improper as to "offend 'a sense of justice'"; he did not add, as he might have, that Mr. Nixon's own approaches to him during the trial, had they been made by the defense, surely would have been ruled in contempt of court.

In the wiretap application cases, the Fifth Circuit ruling already had observed of the Government's presentation that it was "beyond rational dispute that similar false and misleading documents submitted by private individuals would be treated as nothing less than contempt of court."

Well, why weren't they? Why should not Government officials and attorneys be held to the standard stated last week by Judge Irving R. Kaufman in the Second Circuit Court of Appeals: "The dynamics of litigation are far too subtle, the attorney's role in that process is far too critical, and the public's interest in the outcome is far too great to leave room for even the slightest doubt concerning the ethical propriety of a lawyer's representation in a given case."