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The Legality of Wiretapping The National Security Staff

In the 1967 Katz decision, the U.S. Supreme Court held unequivocally that wiretaps are searches, subject to Fourth Amendment standards. A year later Congress enacted a law which set forth detailed safeguards and procedures for obtaining court authorization for wiretaps and for providing the information that a judge needs to reach an informed decision.

The current controversy over bugging National Security Council staff members

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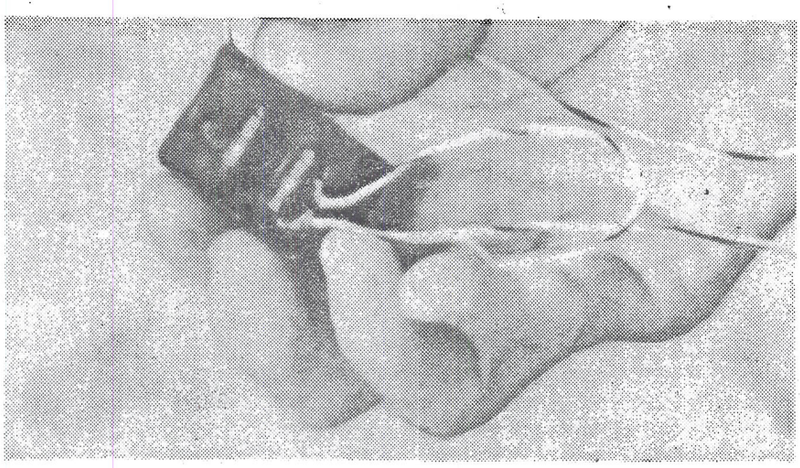
—an offshoot of the Watergate probe—centers on the scope of the government's power to wiretap its own officials (and also newsmen) to ferret out leaks of alleged national security information without court authority and without following this statutory procedure.

In 1969, the administration had taken the position that it could wiretape so-called "domestic subversives" without court approval. Many observers, including myself, immediately warned that this position was not consistent with the law and the Constitution and was not likely to stand judicial examination. By January 1971, several federal district courts had ruled that such wiretaps were illegal, and in June, 1972, the Supreme Court unanimously agreed.



An electronic bugging device.

In the face of this decision, which held unlawful a wiretap that had been installed during the same period and by the same procedure as those now in controversy, it simply cannot properly be said that such taps were legal at the time. (The Supreme Court, when it decides a new question such as the status of these wiretaps, does not make illegal what was previously legal; it gives a final authoritative determination of whether an action was legal when it took place.)

The court noted that the case before it—and therefore its holding that "security" wiretaps without a warrant were illegal—did not involve "activities of foreign powers or their agents." Neither do any of the taps currently at issue, so they cannot be defended on that basis. The unresolved area concerns only "foreign intelligence"—that is, instances were information was conveyed deliberately to foreign nations.

These particular taps, instead, resulted from claims that government officials were leaking classified information to the press; taps were used in hope of identifying these sources. Of course, it is not conducive to effective diplomacy when the substance of government positions and decisions is recounted in each day's news. But it must also be said that when this does happen, as it does sometimes, the nation and its foreign policy, despite momentary embarrassment, seem to survive.

Further, it must be recognized, as everyone who has served in the government well knows, that most leaks are deliberate decisions by senior officials who believe the country's—or their own agency's—interests will be advanced by ignoring classification stamps. It is only when lower-level officials break this monopoly on leaks that massive investigations, taps and lie-detector tests are utilized.

Therefore, leaks cannot justify the extreme and illegal measure of wiretapping without a warrant. Neither can fear or political opinion that is uncongenial to the administration in power. In this dangerous area, protecting real secrets can quickly lead to managing the news.

An apparent case in point is one of the leaks that, according to press accounts, is asserted as a principal reason for the National Security Council taps. This leak, it is said, led to publication of news reports that the United States was bombing Cambodia with B52s. If such was the case, those reports can hardly have revealed secrets to the enemy, who presumably knew they were being bombed. But the press accounts may have exposed facts that the government wanted to keep from the American people.

The temptation to use "national security" as a cloak for suppression of dissent—for limiting the news to what the government wants said—is one of the strongest reasons for confining any "national security" exceptions in the wire-tapping area to genuine foreign espionage.

More broadly, we as citizens of a democracy under law must be concerned about widespread wiretapping for any lesser purpose. Wiretapping strikes at the panoply of protections which our constitution erects around privacy.

Privacy—the ability to be confident of security in our homes and our conversations—is not only the bedrock of individual freedom; privacy of communications is the essence of democracy. If we cannot speak to each other without government eavesdropping, we soon will not be able to speak to each other without government permission.

Despite protestations to the contrary, the efficacy of wiretapping against most crime is greatly overrated. Like coerced confessions, it may seem to offer an easy way to evidence but, in fact, it may divert law enforcement efforts from the search for untainted proof.

For almost two centuries, our constitution and legal system have built safeguards in regard to searches—chiefly requiring the prior decision by a disinterested judicial authority that probable cause exists for such a search. These standards must be applied at least as strictly to wiretapping, held to be a form of search in the Katz decision.

Beyond that, we must guard against the enlargement of the concept of "national security," for it is too general a concept, too subject to governmental abuse, to be a justification to relax those standards, except where foreign intelligence efforts are directly involved.

In one of the early wiretap cases argued before the U.S. Supreme Court in 1928, Justice Louis Brandeis wrote that government is "the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." So it is still with wiretapping.