WXPost JUN 3 1973

Wiretaps: Unsettled U.S. Issue

By John P. MacKenzie
Washington Post Staff Writer

In 1931, Attorney General Mitchell—William D. Mitchell of Minnesota—overruled J. Edgar Hoover and for the first time authorized and directed the young Bureau of Investigation to engage in wiretapping.

Hoover, who had ruled out wiretapping as intolerable and ineffective, disclosed in that year that his bureau had conducted only three wiretaps in the previous seven years—all unknown to him at the time, all for petty crimes and producing petty results—while agents of the lawless Bureau of Prohibition were indulging in massive taps and acquiring the same reputation as their bootlegger targets.

From these small beginnings, and under the edict that only "serious crimes" of great national magnitude would be investigated with wiretaps, the "dirty business" condemned by Justices Holmes and Brandeis has come a long way.

Aided by an improved technology, blessed by the United States Congress under certain conditions and condoned in others, ap-

See WIRETAP, K6, Col. 1

WIRETAP, From K1

proved by federal judges in hundreds of court orders, wiretapping has never before had such respectability. President Nixon's approval of eavesdropping on National Security Council employees makes him only the most recent of presidents since Franklin D. Roosevelt to find the practice indispensable for national, or White House, security.

Yet wiretapping has also produced a growing uneasiness, fed by the sensational disclosures of Watergate and the Daniel Ellsberg trial. Questions are being asked:

- Is it inevitable that a covert eavesdropping system designed to protect America from foreign espionage will be turned upon her own citizens?
- Has Congress made individuals more secure by legalizing some wiretapping, outlawing some and leaving the hardest problems for the courts?
- Can any controls be placed on rampant wiretapping and bugging without enormous political costs to those who try to impose restraints?
- Will Americans, jealous of their "privacy" but anxious also about their "security," ever be willing to renounce wiretapping?

The questions are still unanswered and the United States today seems farther than ever from a truly national policy on the value to be placed on privacy. Thus far, as usual, the elements of society most alarmed about wiretapping are the same civil libertarians who have always been alarmed.

Morton H. Halperin, the former National Security Council staff member whose home telephone was wiretapped in what the Nixon administration calls a search for security leaks, may not wait for more events to unfold. He met this week with lawyers, including attorneys associated with the American Liberties Union, to explore the prospects for a civil damage suit.

A suit by Halperin, which other tap victims both in government and the news media might imitate or join, could provide the much-anticipated test of the administration's assertion of the right to conduct unsupervised wiretapping in a field it defines as "foreign intelligence." It is far from clear how the courts would rule.

The question of warrantless executive wiretaps was settled in the "domestic subversion" area of national security by a unanimous Supreme Court a year ago.

With Justice Lewis F. Powell Jr. writing for the court and Justice William H. Rehnquist not participating, the court held, 8 to 0, that a judicial warrant, akin to those issued under the 1968 Safe Streets Act for crimes like gambling and narcotics, must be obtained before agents may tap or bug suspected American radicals unconnected to any foreign power.

Powell laid to rest the Justice Department's argument that the 1968 act itself, by disclaiming any intention to limit presidential wiretap powers in national securty matters, had recognized the existence of such power. On the contrary, said the court, Congress merely left that question where it found it—undergoing intense debate in court litigation.

Since the act forbids warrantless wiretaps unless the right of unsupervised "foreign intelligence" taps is found to exist, Halperin's case involving admitted FBI eavesdropping would seem a lawyer's dream. The prize: actual damages starting at $100 for each day of unlawful intrusion, punitive damages to make an example of the losers, and reimbursement for legal expenses. The significance: vindication of the right to privacy in a manner that would hurt the personal pocketbook of anyone violating that right.

G. Robert Blakey, a principal draftsman of the 1968 wiretap law on the staff of Sen. John L. McClellan (D-Ark.), thinks so highly of the provision for civil redress that he has confided to friends that he would enjoy trying just such a lawsuit.

According to Blakey and others, the existence of the act is a sign of national health, not a symptom of a disease, proving that laws now on the books may yet prove adequate protection for individual liberties.

That view is contradicted by Herman Schwartz, law professor at the State University of New York at Buffalo, who lays much of the problem at the feet of the 1968 law.

"Allowing this stuff at all has really opened the floodgates," says Schwartz. "Making wiretapping legitimate in 1968 means that it was a bastard before that. Especially when it's extended to national security, there is no restraint except self-restraint, and we know how effective that is."

Schwartz charges that even the claims of effectiveness for conventional, court-ordered taps have been exaggerated. This, too, flatly disputes Blakey and McClellan, who insist that a high percentage of "incriminating" conversations are overheard on judicially approved taps of gamblers and drug pushers.

For Schwartz the most promising safeguard is congressional oversight of the sort some committees intermittently exercise in Central Intelligence Agency matters. Some such proposals are being readied in Congress but passage seems distant.

Other wiretap critics contend that judicial controls, including warrants for justifiable intelligence tapping, should not be written off without more examination.

Nathan Lewin, a Washington lawyer who has represented both the government and private citizens in privacy fights, contends that "at least there could be a record somewhere in a court and you wouldn't have to count on the luck of finding it in a White House file," the way the FBI found records of a wiretap on Halperin in which Pentagon Papers defendant Daniel Ellsberg was overheard.

Walter B. Slocombe, a Washington attorney who has worked on Henry Kissinger's National Security Council staff, adds that judicial scrutiny would at least require the government to come up with some justification and would prevent some officials from inventing "improved" justifications at some later date.

Former Attorney General John N. Mitchell argued that judges weren't equipped to evaluate the need for security measures and warned of national weakness "if the authority to issue a warrant in national security cases is to be vested in magistrates only."

To which Justice Powell replied in last year's "domestic radicals" case: "If the threat is too subtle or complex for our senior law enforcement officers to convey the significance to a court, one may question whether there is probable cause for surveillance."

Even Ramsey Clark and Nicholas deB. Katzenbach, whose drastic curbs on FBI tapping brought scorn from the bureau and "soft on crime" charges in political campaigns, reserved the right to conduct some wiretapping in the national security realm.

That reservation, maintained in President Johnson's 1965 anti-eavesdrop directive, was in keeping with the policies of every president since Roosevelt, who in 1940 ordered Hoover to use the weapon against "fifth column" threats, limited "insofar as possible to aliens."

Each successive administration and attorney general increased Hoover's mandate of his interpretation of his mandate. Attorney General Herbert Brownell's 1954 memorandum on the subject was broad enough to encompass racketeering within the category of "national safety" and the Kennedy administration supplied the pressure and incentive to use it at home.

Lyndon Johnson's command to halt nearly all telephone tapping and microphone bugging was greeted initially by widespread skepticism—except at the FBI, where Hoover wanted it recorded in 1966 that "no such microphones have been utilized since that time in criminal matters."

Hoover asked Katzenbach repeatedly, but with mixed success, to tell this to the Supreme Court—along with Hoover's contention that all FBI taps and bugs had the approval of all attorney generals including Kennedy —when the department began confessing that numerous criminal defendants had been overheard on FBI devices.

The disclosures began after Assistant Attorney General Mitchell Rogovin and his tax division, reviewing the file on former Senate Majority Secretary Robert G. (Bobby) Baker, found that thinly disguised wiretap data was contained in both the Baker file and that of a business associate, Washington lobbyist Fred B. Black Jr.

Other disclosures came with the change in administrations, as Clark told of battles with wiretap fans throughout government.

An agricultural attache from a Communist country was on tour and agents wanted surveillance. "I said, show me he's doing something," said Clark, who had authority to approve or disapprove requests to eavesdrop. "They never came back with a new request."

To Clark the mischief stems from "this mystique of secrecy" by which high officials say to outside critics, "If you knew what I know . . ." He testified in Congress last year that this cult "is responsible for a major part of the peril of international war that we have today, in my judgment. I would like to see some moral leadership that tells us our strength does not arise from such activities."