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Appeals Court Curbs U.S. On Warrantless Wiretap

NYTimes By LESLEY OELSNER JUN 24 1975

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WASHINGTON, June 23—The United States Court of Appeals for the District of Columbia Circuit ruled today that even where foreign affairs and national security were involved, the executive branch must get a warrant before it could wiretap domestic organizations that were neither agents of nor collaborators with a foreign power.

The Supreme Court has ruled that warrants are required in cases of national security matters involving solely domestic affairs, but it has never decided the issue of threats to national security involving foreign affairs.

Today, the appeals court, acting in a case involving the wiretapping of the headquarters of the Jewish Defense League in 1970 and 1971 said that officials who conducted or ordered such warrantless wire-

tapping were liable for damages, unless they could show that they had acted in a reasonable and "good faith" belief that their actions were constitutional.

The court was ruling on a question that the Supreme Court has left undecided, and the majority opinion took note of the far-reaching quality of its decision, saying, "We do not reach this conclusion lightly or without sensitivity to the import or the controversiality of the problem of national security wiretapping."

It added, however, that "the Constitution compels us to do no less."

And it suggested that it would have announced an even broader ban against warrantless wiretapping if the facts of the case before it had been

Continued on Page 13, Column 1

THE NEW YORK TIMES,

COURT CURBS U.S. ON WIRETAPPING

Continued From Page 1, Col. 3

different.

"Indeed," it stated, "our analysis would suggest that absent exigent circumstances, no wiretapping in the area of foreign affairs should be exempt from prior judicial scrutiny, irrespective of the justification for the surveillance or the importance of the information sought."

The majority ruling—written by Judge J. Skelly Wright with two others agreeing in total and a fourth, Chief Judge David J. Bazelon, agreeing on all but one point—was based on the

Constitution, particularly the Fourth Amendment's ban against unreasonable searches and seizures, and on Title III of the Omnibus Crime Control and Safe Streets Act.

Two other judges agreed with the court's conclusion, that the wiretaps in question were illegal, on statutory grounds only. One agreed on constitutional grounds only, and one filed a dissent from the majority.

Whether warrants are necessary for wiretaps conducted on the ground of national security in matters involving foreign affairs has been in doubt for some time, but especially since 1972, when the Supreme Court issued a landmark ruling regarding national security wiretapping but limited its decision to domestic matters.

In that case, known as the

Keith decision, the Court said that warrants were required when the alleged "national security" threat prompting the wiretap solely involved domestic organizations. But, as today's ruling noted, the Supreme Court "explicitly reserved" the issue of the legality of warrantless wiretapping that was based on threats to the national security involving foreign powers.

Lower Courts Acted

Last fall, the Supreme Court declined another opportunity to address the issue, refusing to hear a case involving a Russian convicted of conspiracy to commit espionage.

Some lower courts have ruled

on the issue, though—reaching different results from that of the Court of Appeals here. A spokesman for the Justice Department, which argued the losing side of today's case, said this afternoon that the Attorney General's office was still reading the opinion and thus could not comment on the possibility of an appeal.

Because of the differences between court rulings, however, and the import of the question, an appeal is considered possible, if not probable.

The Court of Appeals ruling today reversed the Federal District judge who first heard the case, John H. Pratt.

Today's case was a civil suit asking payment of damages. It

National Security Agency says it does not believe this law prohibits it from intercepting telephone calls ~~from~~ of American citizens to points overseas. (NYT 9 Aug 75, Nicholas M. Horrock, filed CIA [domestic].)

TUESDAY, JUNE 24, 1975

was brought by 16 persons who were members of the Jewish Defense League against former Attorney General John N. Mitchell and nine special agents or employes of the Federal Bureau of Investigation.

Wiretaps were placed on telephones of the J.D.L.'s New York headquarters for 208 days, beginning in the latter part of 1970 and ending on June 30, 1971.

According to the court's majority opinion, which cited an affidavit by Mr. Mitchell and findings by Judge Pratt in the court below, the F.B.I. had asked permission to install the tap, and Mr. Mitchell approved them because the Soviet Union

was protesting against J.D.L. activities — activities that ranged, the court said, from "purely peaceful demonstrations through acts of violence."

The J.D.L. activities were directed against the Soviet Union's restrictive emigration policies.

Purportedly, the wiretaps would give the authorities advance knowledge of J.D.L. activities and thus allow "adequate counter-measures to be taken by appropriate police and security forces," the court said, citing a memo from J. Edgar Hoover, the late director of the F.B.I., to Mr. Mitchell.

Mr. Mitchell, in his affidavit in the case, said that the tele-

phone surveillance was "authorized by the President of the United States, acting through the Attorney General in the exercise of his authority relating to the nation's foreign affairs and was deemed essential to protect this nation and its citizens against hostile acts of a foreign power and to obtain foreign intelligence information deemed essential."

The basic defense position was that wiretaps in such cases fall into a foreign affairs exemption from the general rule requiring warrants for wiretapping.

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