NYTimes JUN 27 1975

Curbing the Tappers

By Tom Wicker

Among the many questions President Ford was *not* asked at his news conference—none on assassinations, none on his crime program, only one and that peripheral about the Rockefeller report— was one on his attitude toward warrantless wiretapping. Remember his first speech to Congress when he promised there would be no illegal spying in his Administration?

It would have been appropriate to remind him of that pledge this week —first, because his new Attorney General, Edward Levi, had just reported that the Justice Department authorized warrantless wiretaps in 1974 on 148 persons, a significant increase over the average of the previous five years; and second, because the U. S. Court of Appeals for the District of Columbia had just ruled in favor of important new restrictions on the powers of surveillance over American citizens that the Government has been claiming for itself.

The Appeals Court ruling probably will be appealed by the Justice Department, if its past and current attitudes are any guide. The Supreme Court may or may not agree to review the decision; and if it does, it could overturn it. The case concerned Federal wiretaps in 1970 and 1971 on the headquarters of the militant Jewish Defense League. The Appeals Court found that even when the Government claimed to be operating in defense of the national security and in the field of foreign affairs, the Constitution forbade it to wiretap domestic organizations that were not agents or collaborators of a foreign power without a court order permitting the tap.

That appears to leave the Government the right to tap without a warrant only when the tap is to be placed directly on the foreign power—on its embassy in Washington, for example —or on an American citizen or organization known to be an agent or a collaborator of that power. The court went on to say that it would have liked to have gone further, had the facts of the J.D.L. case permitted.

"Our analysis would suggest," said the majority opinion written by Judge J. Skelly Wright, "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."

Compare that highly restrictive view with the expansive claim of Mr. Levi in the letter to Senator Edward Kennedy in which the Attorney General reported the number of warrantless taps placed last year:

"It is the position of the Department of Justice that the Executive may conduct electronic surveillance in the interest of national security and foreign intelligence, and in aid of his conduct of the nation's foreign affairs, without obtaining a judicial warrant."

If anything could be broader than "national security and foreign intelligence," it is "in aid of his conduct of the nation's foreign affairs." Taken together, those justifications would give a President the legal power to tap just about anyone without a warrant, since almost any activity could be claimed to have some relationship to "his conduct of foreign affairs."

In the hands of a determined President, Mr. Levi's assertion of power might even be used to invade by

IN THE NATION

indirection territory definitely proscribed by the Supreme Court. It held in 1972 that the Executive had no constitutional authority to wiretap without a warrant, even on national security grounds, if the supposed threat were solely from domestic organizations or persons.

It would have been useful to know, therefore, if—pending any final ruling by the Supreme Court—Mr. Ford is going to instruct the Department of Justice to proceed by the standard of the Appeals Court, or permit it to continue tapping and bugging under the vast claim of power asserted by Mr. Levi. Incidentally, the report of 148 taps might at first suggest that only 148 people or organizations were overheard in 1974. But the truth is that most of those taps remained in place for substantial periods of time, and that each of them recorded conversations indiscriminately as they took place, so that there is no way to know how many thousands of persons, most of them entirely innocent, were overheard and recorded in the ordinary conduct of their private affairs.

It would also be useful to know if Mr. Ford, in light of the Levi report and the Appeals Court decision, would support legislation to require of the executive branch that it obtain a court order before it placed *any* wiretaps, even for obtaining foreign intelligence.

After all, it was Gerald Ford who in that first speech to Congress last August promised that in his Administration there would be "hot pursuit of tough laws to prevent illegal invasions of privacy." One good way to prevent such invasions would be to require those who want to wiretap to prove to a Federal judge that a demonstrable threat to the national security poses a real need for a strictly limited tap on specified persons or groups.