NYTimes SEP 2 7 1973

Highest-Level Bugging

By Lawrence M. Baskir

WASHINGTON—Throughout the responses of the White House to the charges of improper conduct in Watergate runs one attempt at legally justifying the acts that took place. It is that the inherent power of the President to protect national security permits burglary, wiretapping, surveillance and other violations of the law. This pernicious theory, if accepted, would mean the demise of the American tradition of individual civil liberties, no doubt our nation's most significant contribution to Western civilization.

John J. Wilson and, more recently, the President, have asserted that a recent decision of the Supreme Court recognizes that the President has inherent power to act in his sole discretion in the name of national security. That case, the *Keith* case, did indeed decide the issue, but directly and unanimously against that claim of Presidential power.

The case involved the "Mitchell doctrine"—the claim of inherent power in the President to wiretap without court warrant Americans suspected of being subversive. The Government argued both an inherent power and a legislative authority in the 1968 Omnibus Crime Control Act. That act made wiretapping legal in criminal cases only if a warrant were issued by a court in conformity with the standards set for issuing search warrants under the Fourth Amendment. In *Keith* the Government argued not only that it could wiretap subversives without a search warrant, but that the courts and Congress were constitutionally barred from imposing such a requirement even if they tried. It is interesting to note that Solicitor General Griswold disassociated himself from the case by refusing to sign the brief or argue before the Supreme Court, a most unusual situation.

The lowest point of absurdity came when Assistant Attorney General Mardian, later of Watergate notoriety, was asked in argument before the Supreme Court for his authority for such an assertion. He replied that it stemmed from the Presidential oath of office. Justice Douglas' curt rejoinder was that he too took an oath to support and defend the Constitution. So, in fact, does every employe of every branch of the Federal and state governments. And none has inherent power under that oath to wiretap in the name of national security.

The Supreme Court rejected the Mitchell doctrine of inherent wiretap authority in a unanimous opinion by Justice Powell. In a decision as memorable as the *Steel Seizure* case and *Ex parte Milligan*, the Court disposed once again of the claim that the President is above the law and the Constitution. In words that apply no less to burglaries, enemies lists, wiretapping, and surveillance, and all the other means by which might come the claim that the President is an American Emperor, Justice Powell said:

"History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect domestic security. Given the difficulty of defining the domestic security. Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent."

Far more serious than any of the individual "White House horrors" is the justification advanced to defend them. Both the President and his defenders have argued that the overwhelming command of domestic safety justifies any act—"Even murder?" asked Senator Ervin—no matter how illegal, or how unconstitutional. What is posed yet again in this debate is the issue that the Nixon Presidency has repeatedly raised in the last four years. It is the claim of security over freedom, but a security defined and enforced by the discretion of one man, immune from the restraints of law.

The only hope for security lies, as Secretary Rogers said, in the maintenance of our freedoms. That means, at the least, that no man, no President, may break the law to enforce it, nor violate the Constitution to preserve, protect and defend it.

The words of Justice Davis, one hundred years ago, are still the full and sufficient answer to the claim of inherent power:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its authority."

Lawrence M. Baskir is chief counsel and staff director of the Senate subcommittee on constitutional rights.