

Kissinger Assertion Disputed

By John P. McKenzie
Washington Post Staff Writer

Secretary of State Henry A. Kissinger's assertion that it was legal to wiretap his aides and newsmen from 1969 to 1971 is sharply disputed by three of the targets of the eavesdropping.

Two of the former aides and their families differ so completely that they are suing Kissinger and other administration officials to test the assertion—and to collect thousands of dollars in damages if the courts say it is wrong. A third suit by a former aide was filed and withdrawn yesterday.

However, final word from the courts on the legality of the "national security" wiretaps without a court order is a long way off. The question was explicitly left open by the Supreme Court in 1972 when the justices unanimously rejected a similar Nixon administration claim that it could judge the legality of its own wiretapping.

The legal issue does not depend on Kissinger's "character and credibility" in denying that he initiated or recommended specific wiretaps. Kissinger could win that point before the Senate Foreign Relations Committee and, under the legal theory in the lawsuits, he and others would still be liable for up to \$100 a day in civil damages.

Former National Security Council staff aides Morton Halperin, Anthony Lake and Richard Moore contend that even on Kissinger's version of the facts, he was part of an illegal agreement that caused the invasion of their privacy when their home telephones were tapped.

Moose, now on the Senate committee's staff, withdrew his suit as soon as he filed it but is expected to file again after Kissinger completes reopened proceedings before the Foreign Relations Committee. Lakes suit, which also names President Nixon, was filed yesterday. Halperin filed his a year ago.

Starting in 1969 the Nixon administration claimed the right to wiretap and bug without judicial approach both in cases of domestic subversives and foreign intelligence.

Although the 1968 federal wiretapping law gave judges the power to approve or disapprove wiretaps for crimes ranging from mail fraud to espionage, sabotage and treason, then Attorney General John N. Mitchell said the judiciary was not qualified to evaluate the need for security measures on the home front and in international affairs.

When this proposition was tested in the Supreme Court two years ago, the vote was 8 to 0 against it. Associate Justice Lewis F. Powell Jr., a Nixon appointee who has never been accused of wanting to weaken the nation's global standing, said judges were well-equipped to handle intelligence wiretap applications.

"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," Powell said.

Powell also rejected the government's claim that the wiretap law itself exempted both foreign and domestic security taps from the warrant requirement. All Congress did, said Powell, was to make clear that it was not legislating at all on that subject.

Administration officials frequently have spoken in the vein of Kissinger's statements at his Salzburg press conference Tuesday to the effect that surveillance is legal until it is flatly declared illegal. Some spokesmen have said the domestic taps were legal up to the time the high court outlawed them in 1972.

The Justice Department now takes a broad view of the foreign intelligence field, saying it includes not only overseas security interests but activities at home that affect foreign relations. Thus the department argued that a warrantless tap on the headquarters of the Jewish Defense League was valid because the JDL was hurting U.S.-Soviet relations by holding demonstrations at the Soviet mission in New York.

A federal judge has upheld the government and the JDL has taken its civil suit to the U.S. Court of Appeals here. The issue also is raised in a criminal case in which lawyers for Igor Ivanov, a Soviet national serving 20 years for espionage, seeks Supreme Court review of his conviction. The high court may decide soon whether to hear the criminal case.