THE VOICE OF SCIENCE ON CAPITOL HILL

F. A. S. NEWSLETTER

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A national organization of natural and social scientists and engineers concerned with problems of science and society.

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PRIVACY OF COMMUNICATIONS IN AMERICAN LIFE: EAVESDROPPING AND MAIL COVERS

> **The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**
>
> —Fourth Amendment, U.S. Constitution

COURT-ORDER EAVESDROPPING

Reports of court-orders show that state and local law enforcement agents are usually using wiretaps, at great expense, in criminal cases they could normally solve in other ways. Thus in the most common cases, those of gambling and drugs, hundreds of incriminating conversations are overheard and much business is going on. These cases could be solved without bugging by undercover agents. In cases of extortion, the party being victimized can permit eavesdropping, or make recordings himself. Is wire-tapping often *really* necessary? Since a lot of police work can be done for the $1,000 the median tap costs, tapping may not even be cost-effective.

Presumably, there are cases which can be solved in no other way. But the advantages of permitting these solutions must be balanced against the political costs. Once we permit state and local agents to do *any* wiretapping legally, they must be permitted the right to buy the equipment. And once they have the equipment, it is evident that they cannot be trusted to monitor their own compliance with legal safeguards. They are cops, not attorneys, and catching criminals is their professional interest. From their point of view, unauthorized wiretapping is a "crime without victims." They engage in it in the higher interest of protecting society. No police bureaucracy is going to prosecute its officers for being overly zealous in tapping phones. Even if the public could catch these officers in the act systematically, the FBI is not going to pursue such cases, and the Justice Department attorneys are not going to prosecute.

In addition, permitting, as the law does, "any officer of a State or political subdivision thereof, who is empowered by law to conduct investigations. . ." to buy wiretapping equipment keeps Spy Shops in business. These shops sell bugging equipment under the counter, to private detectives and anyone else, in violation of law. We know that other crimes without victims, such as gambling and prostitution, are

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FAS NO-ABM RESOLUTION HITS SENSITIVE NERVE

On December 27, at its national council meeting, FAS called for an initial separate SALT agreement on ABM– one which would preclude missile defenses or limit them drastically. A related press release arguing for agreements of this kind was widely distributed. On January 9, the New York Times and Washington Post both carried stories revealing that the Soviet Union had earlier offered to discuss just such a separate ABM agreement in the secret SALT talks, if the United States would agree in principle to the idea.

The notion of a separate ABM agreement is a hard one for the Administration to avoid. An ABM limitation has been a presupposition of all other progress in the SALT talks and, unlike agreements on offensive weapons, could be resolved by itself. Many U.S. arms controllers have called for this kind of agreement for years. Indeed, it was the Soviet Union that earlier insisted on the principle that offensive weapons be discussed also.

Furthermore, the talks are now deadlocked on issues involving offensive weapons, such as whether those European-based U.S. aircraft capable of striking the Soviet Union should be covered in any agreement on strategic weapons. Even if the contemplated agreement on numbers of offensive weapons could be reached, the agreement might be no more than a "sham" permitting all-important qualitative improvements – as FAS pointed out in an earlier statement.

An initial ABM agreement would undermine motivation for offensive weapons by precluding the defenses that neutralize them. It would save large resources and the Governmental debating time absorbed by the ABM each year. The agreement would be far more significant strategically than the Partial Test Ban Treaty. The information that the Soviet Union is prepared to discuss an ABM agreement is bound to influence the Senate debate this year. Copies of the Federation statement calling for an ABM agreement are available, in limited quantities, at the national office.

(See also page 5)

See page 4 for discussion of mail covers.

EAVESDROPPING – *Continued from page 1.*

often tolerated by the police with or without payoffs. Imagine how difficult it would be to get the police to arrest their only supplier of spy equipment.

Thus, in order to solve relatively few crimes that could not otherwise be solved, the system has opened the door to widespread unauthorized tapping by police *and* the public.

"NATIONAL SECURITY" EAVESDROPPING

In 1969, the Justice Department, under Attorney General Mitchell, began to try to extend the right to eavesdrop, *without a warrant*, on persons suspected of *domestic* subversion. This extension of the "national security" exception to the need for court orders is both unnecessary and politically dangerous.

It is unnecessary, first, because the groups involved in "domestic" subversion are usually weak. They can normally be controlled without electronic eavesdropping. And, in the case of exceptions, court warrants could easily be secured. No judge is going to turn down a Government request if he thinks there is any chance of a serious threat to the security of the state.

The practice of eavesdropping without court order on domestic groups is politically dangerous because it provides a license to eavesdrop on almost anyone. Martin Luther King and Cassius Clay were picked up on "national security wiretaps" that were obviously being used to monitor domestic groups even before Attorney General Mitchell claimed the right to do so. If the line between domestic and foreign activities were blurred by legal decision, no one on the left would feel secure in talking to any left-wing organization or its activists.

What about "true" national security cases, involving foreign agents seeking information to be exploited against us by foreign powers? A distinction should be made between aliens and citizens and between emergency and non-emergency situations. No executive branch agency should have the right to eavesdrop electronically upon any citizen except under court warrant, or in a national emergency. This would not preclude eavesdropping on aliens, even while they talked to American citizens. But it would provide safeguards to any citizen against eavesdropping, at his home or business, upon all his conversations with other citizens, in the absence of a decision by a disinterested judicial third party.

When Franklin D. Roosevelt first approved national security wiretapping without court order, he referred to "subversive activities. . .including suspected spies" but urged that these investigations be limited "insofar as possible to aliens". The crimes he mentioned were "sabotage, assassinations and 'fifth column' activities." Had he drawn up his memorandum in anticipation of a long twilight struggle rather than of an emerging hot war and "fifth column" one wonders if he might not have hit upon an unequivocal distinction between aliens and citizens.

STATE WIRETAPPING COULD STILL BE STOPPED

The Omnibus Crime Control and Safe Streets Acts authorizes court-ordered *federal* wiretapping. But it permits court-order *state* wiretapping only if the state has a statute permitting wiretapping under judicial supervision.

Only the following 15 states now have such statutes: Arizona, Colorado, Florida, Georgia, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Rhode Island, South Dakota, Washington. In the other 35 states, opponents of wiretapping can prevent any legal wiretapping by state officials by preventing the passage of statutes of this kind. Twenty-eight of these states had been permitting either wiretapping or eavesdropping or both, but had been doing so without court supervision. Supporters of wiretapping in these states are now seeking passage of the necessary legislation with quiet encouragement from the Federal Bureau of Investigation. (In the meantime, illegal wiretapping or eavesdropping is almost certainly going on in wholesale quantity in 28 states.)

The Supreme Court has never addressed the question of the national security exception to requirements for court warrants in searches and seizures of all kinds. The Court would never deny the President the right to act without a warrant, if no time existed to get one. But what if there is time?

The Omnibus Crime Bill institutionalizes the President's powers by saying that the Act shall not:

> ". . .limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. . . .[Or] to take such measures as he deems necessary to protect the United States against the over-throw of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government."
>
> (Title III, section 2511(3))

The Supreme Court could rule that, in an emergency, the President has the right to act as his judgment requires. But if he wants day-to-day eavesdropping on an American citizen in the absence of an emergency, he must seek an authorization by some court. Thus, only national security *and* national emergency would permit the President to eavesdrop on citizens without justifying his actions to some court.*

* In the Chicago Seven conspiracy trial, the Government case for wiretapping without a warrant rests on the claim that the fourth amendment prohibition of "unreasonable" searches and seizures does not preclude "reasonable" ones without a warrant. It argues that information gathering is part of the President's right to conduct foreign affairs–which right is not subject to judicial inquiry. Further, it argues that only the Executive Branch can possess the "expertise and the factual background" necessary to assess the reasonableness of the request. None of this seems particularly weighty, and much of the argument cites cases in which emergency conditions prevailed.

WIRETAPPING WITHOUT COURT ORDER RULED UNCONSTITUTIONAL IN DOMESTIC CASES

On January 12, as this issue was being prepared, District Judge Warren J. Ferguson ruled in Los Angeles against the Government in an internal security wiretapping case. Noting that the Government seemed to approach dissident domestic organizations "in the same fashion as it deals with unfriendly foreign powers", he called such activities an infringement of the constitutional guarantees protecting political freedom even if those organizations espouse views which are "inconsistent with our present form of government."

GOVERNMENT CLAIMS TO EAVESDROP EXCEED RIGHTS IN CURRENT LAW

Government argument in the case of the Chicago Seven conspiracy defends the right of the Attorney General to authorize electronic surveillances to gather information "necessary for the conduct of international affairs". But present law permits such information gathering only for information "essential to the security of the United States".

The Government is also arguing for a similar right to protect against "attempts of domestic organizations to use unlawful means to attack and subvert the existing structure of the Government". But present law provides such rights only to protect against the "overthrow of the Government" or other "clear and present danger to the structure or existence of the Government."

It is evident that the provisions of the 1968 Omnibus Crime Act would not permit the largest part of existing Governmental activity in internal security eavesdropping cases.

EAVESDROPPING – *Continued from page 2.*

IMPLICATIONS OF RECOMMENDATIONS

If the recommendations of this summary were adopted, a real improvement in the public perception of its privacy would occur. After all, state and local law enforcement would have no right even to own bugging equipment. The entire police bureaucracy could be held accountable for violations of the absolute ban. The problems of maintaining discipline over *authorized* police wiretappers would neither arise nor provide excuses for violations.

Federal security agencies would be permitted to own bugging equipment. But they are few in number, squarely in the public eye, and easier for the public to watch. These agencies would be reluctant to act without court order in view of the scandal that would result and the increased difficulty of covering it up. Gone would be the possibility of intramural arguments in the Justice Department over whether a tap was authorized or not.

The President could continue to eavesdrop on foreign embassies of hostile foreign powers. Most of the "38" eavesdropping installations (see page 6) are almost certainly of this type. But to tap the phones of Americans who might be spying for these foreign powers, he would have to get a court order. He would not have, and ought not have, an unchecked right to eavesdrop on any citizen for any period of time. Such a right could someday undermine the Republic, since it could so easily be used to unfair political advantage, perhaps to maintain him in power beyond his right.

Indeed, the very possibility that improper use is being made of this now unchecked-power is enough to constrict blood vessels in the body politic. As things stand today, no Senator, perhaps no politically active adult at all, has failed to wonder at some time if his phone is tapped by Government officials. And many make this assumption. This provides a basis of apprehension that will underlie whatever next Joe McCarthy period may arise. Already, in the Senate, much additional time is wasted, and confusion caused, because of the distrust of telephones by Senators and aides. In a time of real political struggle, with the technology available today, political communication is going to be seriously inhibited.

Speaking generally, inhibitions on free debate pose a threat to U.S. interests and institutions that must be weighed against the risks of crime and espionage. In time of political crisis, the specter of eavesdropping may inhibit badly-needed Senate dissent. It may immobilize the public at large. It already has inhibited the telephone conversations of Presidents. And it has inhibited the conversations of political candidates for the Presidency who fear the advantage the other party might achieve in hearing their plans, or leaking their scandals.

The distinctions provided in the above recommendations embody the spirit of the Constitution. They protect citizens against arbitrary state power, and provide a check to that power in a way that does no harm to legitimate executive branch interests. But still more important, they protect the Republic from a willful or just inertial accumulation of such great Executive Branch power as would paralyze the political discussion upon which all freedom and security depend.

Jeremy J. Stone

BACKGROUND FACTS ON WIRETAPPING

On June 19, 1968, the law on wiretapping and microphone eavesdropping was clarified by the Omnibus Crime Control and Safe Streets Act of 1968. The law had been confusing for 35 years.

The Federal Communications Act of 1934 had asserted flatly that "No person... shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person..." Further, the Supreme Court had ruled that information collected in violation of this statute could not be used in criminal prosecutions. But since wiretapping is primarily useful for providing leads to evidence, rather than evidence itself, law enforcement officials were still strongly motivated to engage in it.

The Executive Branch devised an ingenious interpretation of the law. It argued that the statute only prohibited "tapping *and* divulging". Agents would just not divulge. Of course, agents would divulge to each other, or to superiors, but the theory was invented that the Executive Branch was in effect a single "person". Understandably, federal law enforcement officials were reluctant to enforce wiretapping restrictions against state and local law enforcement officials while they themselves were engaging in wiretapping.

In 1967, the Supreme Court opened the doors to eavesdropping done under court order. It indicated (Berger v. New York) that suitable state statutes might permit wiretapping by court order *and* the use in court of the evidence derived. In another case (Katz v. United States) it suggested that eavesdropping by microphone might also be authorized and used.

The Senate Judiciary Committee had been holding hearings on related problems of privacy since 1966. Its work, and the general legal confusion over wiretapping, motivated Congress to clarify the law. Congress did so in the Omnibus Crime Control Act of 1968. It legalized court-order wiretapping by federal and state law enforcement officials, while reinforcing the existing prohibition on electronic *public* spying.

In the first full calendar year since the law was passed, detailed official reports show that 269 applications for

Continued on page 6.

MAIL COVERS: THE POST OFFICE CAN MONITOR YOUR MAIL

Under existing practice, the Post Office may make a daily record of all information on the outside of the letters sent to you. This "mail cover" will not be disclosed to you at any time. Under Post Office Regulation 861.4, it may be initiated by any law enforcement agency upon written request of the Post Office. Law enforcement agencies must "stipulate and specify" the reasonable grounds that exist which demonstrate the mail cover is necessary to (1) protect the national security; (2) locate a fugitive; or (3) obtain information regarding the commission or attempted commission of a crime. Except for suspects in national security cases, no mail cover order will remain in force more than 30 days (Regulation 61.64). In 1965, the Post Office testified that about 12,000 people a year were watched (18% for the Treasury; 10% for the FBI; 55% for the Post Office; 17 other categories had smaller percentages). Existing regulations do not preclude attempts to note all addresses on mail coming *from* some source who unwittingly cooperates by depositing his mail in a customary place or places. Congressional testimony has established the previous existence of mail covers on out-going mail.

During periods of political repression, the existence of these post office regulations will, at the least, discourage those who feel themselves to be politically suspect from using the mails. Letters could be mailed without return addresses, of course. (Whether or not, fingerprinting of the outside letter is feasible is unclear). But the fact that the mail may be stopped for examination of the exterior provides a great temptation to law enforcement agents. They may corrupt post office employees, either financially or through appeals to some form of law-enforcement patriotism. They may then borrow the letters and open them, or use technology to read the contents without opening them.* The use of such technology might well be considered permissible now, or in the future, by the Post Office; its regulations read:

> No persons in the postal service, except those employed for that purpose in dead-mail offices, may *break or permit breaking of the seal* of any matter mailed as first-class mail without a search warrant, even though it may contain criminal or otherwise unmailable matter, or furnish evidence of the commission of a crime." (italics added)

The Post Office has used such misleading statements before. See the box on this page.

Further, many will fear that the Post Office would "loan" the Justice Department letters, without a court warrant, in cases deemed by the latter to be "national security". This would parallel existing practice with "national security" wiretaps made without court order.

*Alan Westin notes the use of passing visible light or reflected infra-red energy through the envelope, taking a picture, and then deciphering. Needle-thin "flashlights" may be inserted into a sealed envelope to "light it up". (Pg. 79, Privacy and Freedom, Atheneum, N.Y.)

BUREAUCRATIC OBFUSCATION

The seal on a first-class piece of mail is sacred. When a person puts first-class postage on a piece of mail and seals it, he can be sure that the contents of that piece of mail are secure against all *illegal* search and seizure. The only time first-class mail may be opened *in the postal service* is when it can neither be *delivered as addressed* nor returned to the sender. (Italics added)

–Chief Postal Inspector, February 23, 1965

At the time this statement was made, the Post Office was secretly handing mail in tax levy cases over to Internal Revenue Service where it was opened. Hence the italicized words were not redundant but critical. (Embedding important qualifications in a Government statement in such a way that they seem to reflect only redundant emphasis is a prime technique of bureaucratic obfuscation.)

NOMINATIONS MOVING FORWARD

At its December 27 meeting, the FAS Council amended the bylaws so that the nominating committee could, in consultation with the Council, nominate only one candidate each for Chairman and Vice Chairman. Members at large may continue to nominate alternate candidates by petition. For the March elections, the Council nominated Herbert F. York and Marvin Goldberger for re-election, as Chairman and Vice Chairman respectively.

This change in bylaws was motivated by consideration of the difficulty of securing two suitable nominees whose chances of election were reasonably equal. This problem was especially acute in the case of renomination of officers. The procedure now being followed parallels that of many other organizations of scientists–such as most professional societies.

The April newsletter will contain a ballot with brief biography of the following candidates for Council members along with that of a few others still being sought by the nominating committee: Barry M. Casper, TACTIC Coordinator; Leslie Gelb, former Acting Deputy Assistant Secretary for Policy Planning and Arms Control; Laurence I. Moss, Executive Secretary, Committee on Public Engineering Policy of the Academy of Engineering; Arthur S. Obermayer, President and Chairman of the Board of Moleculon Research Corporation; John Platt, Mental Health Research Institute, University of Michigan; Eugene Skolnikoff, Chairman, Department of Political Science, MIT; Richard H. Ullman, Associate Dean, Woodrow Wilson School, Princeton University.

NOW YOU SEE IT, NOW YOU DON'T

The Administration reaction to the Soviet offer to discuss an ABM limitation (page 1) is likely to be negative. The Administration will probably continue to ignore the U.S. MIRV program and argue, on the basis of a double standard, that the U.S. ABM must continue as a "bargaining chip" to achieve a halt in the *Soviet* MIRV program of building SS-9s. The way in which Administrations change their tune with circumstances is revealed in the quotations below. When the SENTINEL, and later the SAFEGUARD, ABM programs were begun, the Administration allayed anxieties about the arms race by saying ABM was *not* a bargaining chip.

Poster from the 1970 FAS Campaign against the ABM reduced from the wall size delivered to each Senator.

IS ABM A BARGAINING CHIP?

". . . it would be my judgement that . . . to proceed with Sentinel would have little, if any, impact on the Soviet interest in negotiating strategic arms limitations."

Gerard C. Smith, SALT negotiator and
Director, Arms Control and Disarmament Agency
March 6, 1969 before Gore Subcommittee

Question: Do you have reason to believe that the Russians will interpret your ABM decision today as not being an escalating move in the arms race?

PRESIDENT NIXON: *"I have reason to believe . . . that they would interpret it just the other way around . . . the Soviet Union recognizes very clearly the difference between a defensive posture and an offensive posture . . . an interesting thing about Soviet military history: They have always thought in defensive terms . . . the Soviet Union cannot interpret this as escalating the arms race."*

PRESIDENT NIXON at Press Conference
announcing SAFEGUARD, March 14, 1969

SENATOR GORE: *"(what) if the United States modified this program to be . . . a hard defense against offensive missiles from the Soviet Union, what would be their reaction?"*

MR. SMITH: *"I would not think that it would have a great effect on the Soviet mentality . . . Their general attitude in the past has been, 'Well, defensive missile systems don't threaten anybody. If you want to spend a lot of money on them, that is your business'."*

Gerald C. Smith, SALT negotiator and
Director, Arms Control and Disarmament Agency
March 6, 1969 before Gore Subcommittee

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WIRETAPPING BACKGROUND – *Continued from page 3.*

court-orders were made to state judges, and 33 to federal judges; federal requests are rising, however. Only two requests were denied. 90% involved telephone taps as opposed to microphones. More than half were for gambling and drugs. The median tap cost about $1,000. Under the law, those whose phones were tapped under court order were advised that their phone had been tapped no less than 90 days after the interceptions took place.

The law forbids manufacture, distribution, possession, and advertising of devices "primarily useful" for surreptitious interception of oral or wire communications. The Senate Judiciary Committee report on the law emphasized that a device would not escape the prohibition merely because it "may have innocent uses". But the Justice Department cannot bring itself to prosecute, for example, those buying or selling very small microphones unless the microphones are specially designed to be concealed, e.g., the olive with transmitter inside. Even here there is a strong tendency to overlook the sale of such devices because the shops engaged in such sales are simultaneously legally selling the same things to local and federal law enforcement agents.

EMERGENCY WIRETAPS WITHOUT COURT WARRANT

The Act permits wiretaps without a court order for up to 48 hours in the face of an "emergency situation", if a suitable enforcement officer "reasonably determines" that there are grounds for such an order. In the absence of good faith on the part of law enforcement officials, this permits a "tap until you find" situation followed by an ad hoc court order. Also, this procedure vests in the tapper the right to determine the "reasonableness" of the tap. This is probably unconstitutional, since Katz versus U.S. held in 1967 that estimates of probable cause had to be scrutinized by a "neutral magistrate".

Unfortunately, the otherwise adequate records of the Administrative Office of the U.S. Courts do not discuss how many of the court-ordered taps exploited this provision. (On Oct. 5, 1970, The Attorney General said the Justice Department had not yet used it). This omission should be rectified because one purpose of the statistical collection is to permit an already authorized National Commission on Individual Rights to begin reviewing the law on January 1, 1972.

HOW ARE SECURITY WIRETAPS AUTHORIZED?

On February 14, 1970, Mr. J. Edgar Hoover testified that he had 36 telephone surveillances and two microphone installations in such FBI security cases. Three years earlier, on March 17, 1967, then-Attorney General Ramsey Clark told the House Judiciary Committee that he had "about 38" national security wiretaps. From the startling sameness of these estimates, one might conclude that the national security wiretaps are long-standing installations associated with foreign embassies and related installations and residences. Unlike the court-ordered wiretaps, no official reports on these taps are required, and there is no subsequent notification of the persons tapped.

In 1967, the Johnson Administration had urged Congress to prohibit all wiretapping except for national security wiretaps. Clark testified that the Justice Department was following these guidelines voluntarily and had no wiretaps in the field of crime. As for national security wiretaps, in a memorandum of June 16, 1967, Attorney General Clark advised the national security agencies to take up with him any "special problems" they might have "in the light of existing stringent restrictions". This suggests that there are standing regulations for the military intelligence agencies and CIA under which they operate without separate written authorizations from the Attorney General in each instance. Congress has probably made a perennial mistake in not inquiring about the national security eavesdropping authorized by the Defense Department and the CIA under these regulations. On August 11, 1970 in an interview, Attorney General Mitchell said he approved personally "every wiretap that is used out of the Federal Government". But whether he meant to include microphone installations under the term "wiretapping" is unclear. And whether "personal" authorization means "individual" authorizations is also uncertain.

MAKE USE OF YOUR PROFESSIONAL MEETING

Federation members willing to distribute, or arrange to distribute, FAS promotional material at meetings of their professional society are urged to contact the director.

The post office box of Science & Government Report is Box 21123, not 23123 as was incorrectly reported in January.

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