2/18/71

Mr. Alan Barth
The Washington Post
1515 L St., NW
Washington, D.C.

Dear Mr. Barth,

We are all in your debt for that excellent statement of both opinion and fact in this morning's paper, titled "Should Mitchell Eavesdrop without Court Approval?" It is important writing, in a proper context, and it addresses the rapid disappearance of our most basic rights. Especially do I like what most today eschew, the accurate use of the description "authoritarian" and the reference to Orwell.

All of this has been very much on myx mind and, to a degree, has dominated my life, because of my recent writing and official disapproval of and interference with it. Pre-eminently, this has been by the Department of Justice.

Our rights, the sanctity of the law, the integrity of government and even that sanctioned use of eavesdropping, in the last analysis, depend upon the federal word. You did not have space for this, so it is this that I address. Somebody, in the sanctioned eavesdropping, has to give his word to a judge or an official who then accepts that word. The dependability of the given word is therefore relevant.

I now speak only from personal experience, 100% of which is supported by written statements of the Department of Justice and other agencies to me and in my possession.

First, I asked for the public official records used to extradite James Earl Ray. When, after six months without any response, I obtained a lawyer, there then ensued a long series of letters not a single one of which is truthful! First the Deputy Attorney General denied the possession of those records his Department originated. Then he repeated this lie. But these records had not only originated with Justice, as it turned out, they had also confiscated the records of the British court - with the assent of that court and that government (here,too, it is all in writing and in my possession, from the clerk of that court, by direction of the chief magistrate, and the Home Office). So, I filed suit.

Just before the long-delayed hearing, the Department capitulated and promised to deliver that which I sought, unde the law "public information". But they held back, and eventually I got what I believe is rather exceptional, a summary judgement against Justice. Despite that, to this day I haven't gotten 10% of what was ordered given me. My book will be out in two weeks, but I'm still waiting for a small part of this. Worse, and stupidly and needlessly, a Department lawyer perjured himself, swearing falsely that he had delivered what he had, in fact not. This is proven by both the later covering letter and the presence of a Washington Post reporter, Paul Valentine. Need I accent the materiality when his false swearing was about what the court had ordered delivered, what I sued for.

I then asked Mitchell who watches the watchman, who jails his lawyer for what he'd jail me for. He has not replied. Nor has he or the lawyer involved denied what I tell you.

I have since filed other actions in which, knowingly, the Department has grossly

misrepresented and misquoted the law. Again, it is all in records in my possession. In one instance the lawyer cited as the law what Congress specifically rewrote the law to eliminate. That case is on appeal. In another, now sub judice (I just filed some of my papers two days ago), there is not a single accurate or complete quotation of anything - letters, appeals, rejections, regulations or laws. Misquotation is so obvious that I, a non-lawyer representing myself, have documented the infidelity of every one! The relevant portions of the law were eliminated. The relevant regulations were entirely withheld from the court. The net effect was to make up down, whit black.

And still again, perjury, I think amply proven in the papers I have just filed. But, with all these lies to catch up with, and having them withheld from me until I'd completed response to one set before getting the next, it was impossible for me to meet the time deadline and rewrite. So, I cannot but wonder if a busy judge can or will find time to read such lengthy papers. However, I had to prepare them, in itself an intrusion into my writing and my freedom to write, as is the denial, again of public information, copies of official evidence in a published proceeding.

Now, if this same Department of Justice would lie under oath to a federal judge in two separate proceedings in which I am plaintiff, once the perjury by it and the other time, in effect if not in fact, suborned by it, what does it mean when it certifies the need to tap wires, eavesdrop or in any way inhibit the rights of any American, good or bad (and may I remind you that the rights of the "good" have been established, if that remain the correct word, in defense of those of the "bad")?

As the enclosed review from Publisher's Weekly (based on proofs) of my about-to-be printed book reflects, it is really an analysis and study of the Department of Justice and what it dominated.

These boys have "improved" upon Orwell's Big Brother, who re-wrote history after it happened. This gang is rewriting it as it happens. All piety, patriotism and zealousness, all holier than the pope, all in the "national interest".

If you doubt one word of this, you are welcome to read more than I think you will undertake. The letters might take you less than an hour. But my last papers documenting this total dishonesty ran 110 pages.

This is but one aspect. I have spared you the other intrusions, which I will not permit to limit my use of either the (intercepted) mail or the phone. I have what I am not yet ready to disclose publicly but can show you, as I believe I have shown Paul, carbon copies of some of the intelligence against me, complete with cancelled checks to the subcontractor, conversations between his Washington and filed office, the letterhead and envelope of the "front" used - in short, the works, because it was too much for the stomach for one employee, who gave me these things and quit.

It is not only later than you think. It is worse than you say.

But congratulations are hardly enough for so fine a piece, so genuine a public service, so very good a sample of what the press should be doing more then it is.

Sincerely,

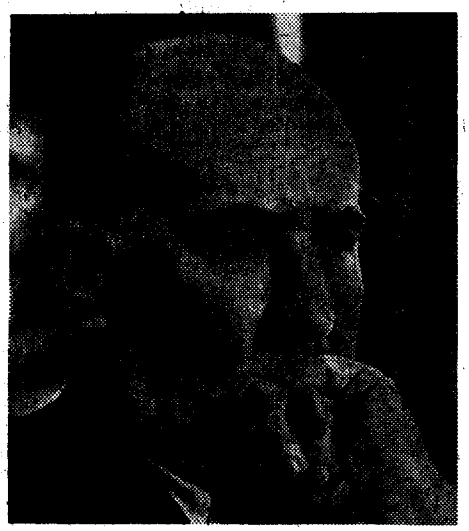
Harold Weisberg

Should Mitchell Eavesdrop Without Court Approval?

By Alan Barth

ATTORNEY GENERAL John Mitchell has come forward with a proposition which, for sheer audacity in the assertion of executive power, may well be unsurpassed by anything since the late Oliver Cromwell installed himself as Protector of England in 1653. The general purport of the proposition can be summarized in a slight variant of a currently popular slogan: All power to the President.

The proposition is set forth in a memorandum filed a few days ago by the Department of Justice with the Sixth U. S. Circuit Court of Appeals, asking that court to set aside a ruling by U. S. District Judge Damon J. Keith in Michigan that the Attorney General has no authority to conduct electronic surveillance in domestic national security cases without prior court approval. The department has asked the Ninth Circuit Court to overturn a similar ruling by another U. S. District Judge in California.



ATTY. GEN. JOHN MITCHELL

In order to appreciate the peril from which the Attorney General was seeking to save the country by electronic eavesdropping, it is necessary to know a little bit about the facts of the Michigan case. It involved three defendants who call themselves White Panthers and who are accused of bombing the Ann Arbor offices of the CIA in 1968, presumably because they disapprove of U.S. government policies.

Bombing is a very serious crime, of course, and no one suggests that it should not be investigated and prosecuted. Whether or not it threatens the security of the United States, it undoubtedly violates the laws of Michigan. Judge Keith did not even suggest that he had any objection to the use of electronic surveillance in investigating the crime—provided a warrant, or court order, had been obtained in advance—something which the Omnibus Crime Control and Safe Streets Act of 1968 specifically authorizes.

Judge Keith even went so far as to say that the obligation to get a warrant for electronic surveillance could be waived in an investigation of subversive activities carried out by foreign agents, a debatable position. He asserted, however, that the "executive branch of our government cannot be given the power or the opportunity to investigate and prosecute criminal violations under two different standards simply because the accused espouses views which are inconsistent with our present form of government."

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THE PROPOSITION put forward by the Attorney General, in his own language, is as follows: "The President, acting through the Attorney General, may constitutionally authorize the use of electronic surveillance in cases where he has determined that, in order to preserve the national security, the use of such surveillance is reasonable." And he contends that it makes no difference whether the threat to the national security comes from foreign subversives or from domestic subversives.

The reasoning behind this proposition is the reasoning behind every form of totalitarianism. The first duty of a sovereign is to protect his sovereignty; the first responsibility of any government is its own perpetuation. Therefore the presidency carries with it "inherent" power to do whatever the President thinks he needs to do to protect the government of the United States from overthrow by force and violence. The Constitution which the President has sworn to preserve would, argues the Attorney General, "hardly render him powerless to do so."

Setting aside the question whether an inability to tap telephones without a warrant would actually render the President "powerless"—getting a warrant has never proved very difficult—and setting aside also the question whether the White Panthers seriously threaten to overthrow the government of the United States by force and violence, the scope and reach of Mr. Mitchell's proposition remains altogether staggering.

The doctrine of inherent power is a doctrine of limitless authority. It is the very antithesis of a government of laws—and especially the antithesis of a government of limited powers specifically delegated to it by the people through a written constitution.

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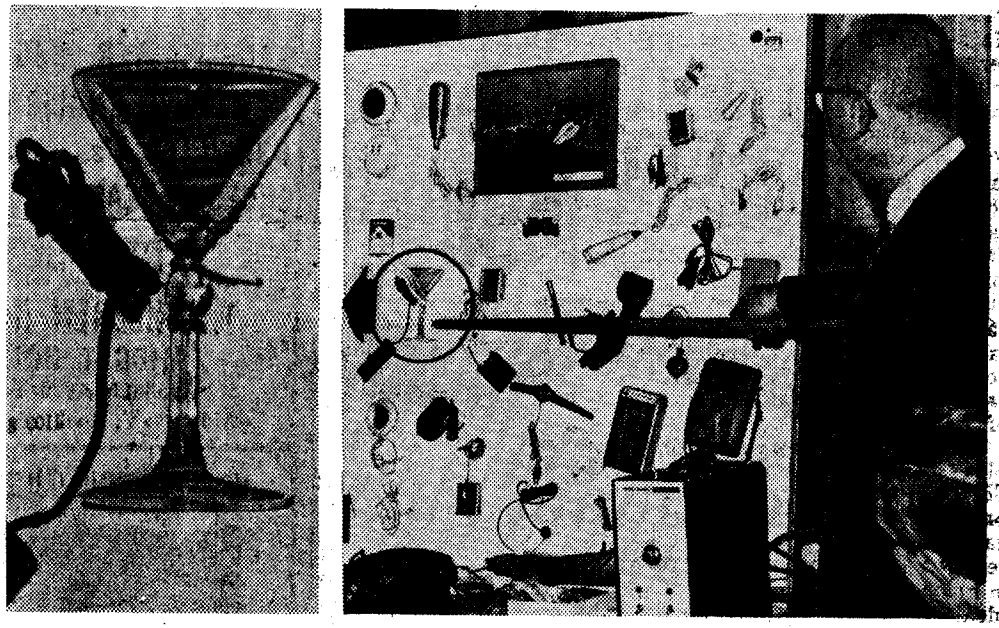
IN 1967, the Supreme Court ruled that electronic surveillance entails a search of the sort circumscribed by the Fourth Amendment. " 'Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' " wrote Mr. Justice Stewart, "and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment . . ."

If Mr. Mitchell argues that the inherent powers of the President entitle him to tap a citizen's telephone or bug his bedroom without a warrant, why should he not also argue that these powers entitle him to ransack a man's home and seize his private papers without a warrant whenever he suspects him of subversion?

One cannot help wondering, indeed, if Mr. Mitchell's logic will not carry him one day into contending that the President, acting through his Attorney General, may, when he deems the national security to be in peril, clap a suspect in jail or have him executed without any of the inconvenient formalities of due process.

Could the President, acting through his Attorney General in the name of national



A detective explains eavesdropping devices that can be concealed in every day items at a Senate Judiciary Subcommittee hearing.

security, order a telescreen—in the manner of George Orwell's "1984"—placed in every American home, in order to save the country from subversion? It is no answer to this anxiety to say that the Attorney General has no intention of committing such excesses.

In his memorandum to the Court of Appeals, the Attorney General advances another ingenious but essentially disingenuous argument. "The government merely contends," he says, "that when the President, through the Attorney General, determines that the use of electronic surveillance is necessary to gather intelligence information needed to protect the national security, the resulting search and infringement of constitutional rights in not 'unreasonable.' "

But this is a patent begging of the essential question to be decided. The purpose of the Fourth Amendment was to interpose between the citizen and his government the detached and impartial judgment of a judicial officer. The determination of the reasonableness of a search cannot fairly be made by the executive official who wants to prosecute the suspect; it can fairly be made only by a judge. That distinction is a foundation of American jurisprudence.

MR. MITCHELL is a conscientious as well as a zealous and patriotic Attorney General. But there is very little in the past record of official electronic surveillance—or at least in what little has been disclosed of that record—to indicate that if left to unchecked administrative authority it would be applied discriminatingly or exclusively against real threats to national security. When one remembers the names of persons reportedly bugged or tapped by the FBI in recent years —the late Dr. Martin Luther King, for example, or Muhamed Ali or Bobby Baker or the gambling czars of Las Vegas to cite but a few—one cannot help concluding that the Justice Department fishes for subversives as one fishes for sardines, with a very large net.

Electronic surveillance may be an effective device for catching subversives. There have been attorneys general who say it is and attorneys general who say it is not. But whatever its virtues, it has vices, too. And Mr. Mitchell seems to have given these vices scant consideration.

IN a recent article on the prevalence of FBI wiretapping, Washington Post Staff Writer Ronald Kessler reported: "About a quarter of the senators, congressmen, lawyers, businessmen and journalists responding to a Washington Post questionnaire said they have suspected or believed that their telephones were tapped or their offices bugged."

Such fears may be, as Mr. Mitchell termed them, symptomatic of paranoia. But they are also symptomatic of an anxiety altogether out of place in a free society.

There is a terrible and exorbitant cost in such anxiety. Law-abiding men and women are kept from communicating with each other freely. The very essence, the core, of what makes Americans believe that life in this country is better than life in the Soviet Union is not so much the prevalence of affluence as the absence of constraint. To feel secure against officious intrusion, against the fear of that ominous rap upon the door at night which is the symbol of the police state is to enjoy the reality of what is meant by "the blessings of liberty."

It was, according to the authors of the American Declaration of Independence, precisely for the purpose of securing to individuals certain "unalienable rights" that "governments are instituted among men." What a travesty it would be if, in the name of protecting national security, Americans were to forfeit the individual security for the protection of which their government was established! Perhaps the Attorney General has his priorities reversed.

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PHILIP L. GRAHAM, 1915-1963

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