Can Mr. Mitchell Bypass the Courts?

Searches, Security and the Law

By Alan Barth

NO DIRECTOR of the FBI is likely to refer to Attorney General John N. Mitchell as a "jellyfish." Shortcomings he may have, but there is nothing quivering about the incumbent chief counsel to the President of the United States. Mr. Mitchell believes in governmental authority and does not shrink from exercising it.

The Attorney General has but lately commended the police of Washington warmly for making mass arrests of crowds, some members of which were lawless and disorderly—and never mind the "technicalities" of probable cause and individual culpability.

His Justice Department contended recently in federal courts that it has power, when it considers the national security threatened, to enjoin newspaper publication —and never mind the ancient Anglo-American principle of law that there can be no prior restraint of a free press.

And hardly a fortnight ago he again asserted his astonishing doctrine that the President, acting through his Attorney General, possesses an inherent power, growing out of his duty to "preserve, protect and defend the Constitution," to conduct searches of the persons, houses, papers, and effects of American citizens whenever he deems it "reasonable" to do so—and never mind the constitutional stipulation that the reasonableness of a search must be determined by a detached judicial authority and that official searches may be made in this country only with the prior approval of a court.

MR. MITCHELL'S justification for his "inherent power" doctrine was set forth in a speech before the Virginia State Bar Association. "The reasonableness standard of the Fourth Amendment," he said, "is a flexible one and does not require in all cases that a warrant be obtained. It is our position that compelling considerations exist when the President, acting through the Attorney General, has determined that a particular surveillance is necessary to protect the national security and that under these circumstances the warrant requirement does not apply."

The Fourth Amendment quite simply forbids unreasonable searches—and without a syllable to suggest any exception whatever for what an Attorney General, or even the President, may consider "necessary to protect the national security." In 1967, the Supreme Court decided that electronic eavesdropping, which is what Mr. Mitchell wants to do without a warrant, is a form of search circumscribed by the Fourth Amendment. And, as though offering a direct admonition to Mr. Mitchell, the court, in an opinion by Mr. Justice Stewart, said: "Over and again this court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

But the Attorney General argues that national security is one of these exceptions. Well, the kind of exception which the court has deemed justification for a search without a warrant is a search conducted as incident to a lawful arrest—that is, an arrest itself justified by probable cause—or a search of a vehicle likely to move evidence beyond the reach of the police. The courts subsequently pass upon all such searches; and they seem a far cry from giving an Attorney General blanket authorization to eavesdrop on anyone he regards as subversive.

Anyway, the court just last Monday took occasion to offer the Attorney General an-

but in a manner to be prescribed by law.

ARTICLE IV.

Right of Search and Seizure Regulated.

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.

ARTICLE V.

Provisions concerning prosecution. Trial and Pun-

Attorney General John N. Mitchell: "The reasonableness standard of the Fourth Amendment is a flexible one and does not require in all cases that a warrant be obtained.

other unambiguous lesson in constitutional law. Speaking again of the Fourth Amendment, the court said: "In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing every man's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important."

The Attorney General's speech to the Virginia lawyers contained another statement which seemed somewhat disingenuous. In passing the Omnibus Crime Control and Safe Streets Act of 1968, Congress, he said, "carefully avoided imposing the warrant requirement in national security cases by including a provision in the statute which explicitly recognizes the President's authority to conduct such surveillances." But Congress did nothing that can reasonably be so construed. It said merely that nothing contained in the law it enacted shall "be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States . . ." Obviously, Congress could not limit "the constitutional power of the President," even it it wanted to. And conversely, of course, Congress could not empower the President to do what the Constitution forbids.

THE FUNCTION of a Constitution is to define and delimit governmental power. But under Mr. Mitchell's view of the U.S. Constitution, the power of the President would be without limits whenever he decided that the national security was imperiled. If he can determine, without reference to the courts, that an electronic search is "reasonable," he can determine that any kind of search—even the ransacking of a home or office—is "reasonable." That would amount to an outright nullification of the Fourth Amendment —the function of which is to interpose the detached judgment of a court between executive power and the people.

And the nullification need not stop there. If the President, acting through his Attorney General, can bypass the courts whenever he thinks the national security justifies it, he can bypass the courts—and Congress too—whenever he believes that freedom of the press or the observance of due process threatens national security. The Attorney General's doctine is a doctrine of limitless presidential power. Indeed, it is a doctrine of presidential sovereignty. But in America, sovereignty resides in the people.

One is reminded of the words spoken more than 300 years ago by King Charles I of England, a man also deeply conscious of his duty to his country: "For the people, I truly desire their liberty and freedom as much as anybody whatsoever; but I must tell you, their liberty and freedom consists in having government, those laws by which their lives and their goods may be most their own. It is not their having a share in the government; that is nothing to them. A subject and a sovereign are clear different things."

It must be remembered, however, that those words were uttered by King Charles upon the scaffold, with his dying breath, and just before he lost his head.