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The Goat and the Cabbage Patch

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IN THE NATION

WASHINGTON, March 10—Assistant Attorney General William H. Rehnquist could hardly have picked a worse time than the present to assert that there is no need for legislation to limit the Government's power to gather information about its citizens and store it in computers.

Such legislation was not needed, Mr. Rehnquist said with a straight face, because abuses would be averted through "self-discipline on the part of the executive branch."

This may appear merely ludicrous, coming on top of the exhaustive accounts that have unfolded before the Ervin subcommittee of the Army's "self-discipline" in the widespread surveillance program that the "self-discipline" of the highest officials of the Johnson Administration permitted them to approve and maintain.

But Mr. Rehnquist's assertion also appears disingenuous, since it was made on the same day that Senator Charles Mathias of Maryland told the subcommittee that last Dec. 10 Attorney General Mitchell had transferred the "Project Search" system of electronic analysis and retrieval of criminal histories from the Law Enforcement Assistance Administration to J. Edgar Hoover's F.B.I. This transfer was not publicly announced, nor was it mentioned when L.E.A.A. announced a further grant of $1.5 million to Project Search on Dec. 16.

Senator Mathias, long a student of the data-bank problem, said Mr. Mitchell's transfer order made no mention of the code of ethics for safeguarding data-bank information that had been developed by Project Search—a code that an F.B.I. spokesman has termed "very objectionable," Mr. Mathias said.

The Senator concluded that "these events add up to a quantum jump toward a national criminal justice data bank—a leap taken without full public knowledge or specific Congressional authorization. It will probably be touted as a great advance for law enforcement. It may also be feared as a tremendous threat to individual rights."

Mr. Rehnquist's favorable view of Government "self-discipline" ought also to be viewed against Mr. Mitchell's contention that the executive branch has unlimited right to use electronic surveillance, without seeking the permission of or notifying any court, against persons or organizations the executive branch considers a threat to the national security; nor need the existence of such a bug or wiretap ever be acknowledged to the victim or to anyone, in the Mitchell view.

Supporting this doctrine in a long letter to The Washington Post, Deputy Attorney General Richard G. Kleindienst quoted President Franklin Roosevelt 's order of May, 1940, authorizing the use of listening devices against "persons suspected of subversive activities." Mr. Kleindienst did not, however, quote Mr. Roosevelt's belief, stated in the order, that "under ordinary and normal circumstances wiretapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights."

Nor did Mr. Kleindienst quote the part of the Roosevelt order that said the President had in mind "grave matters involving the defense of the nation." He did, however, cite Mr. Roosevelt's instructions that even to protect national security, eavesdropping should be held to a minimum and limited "insofar as possible to aliens."

That is the crux of the matter. The Roosevelt order was aimed rather specifically at the threat of espionage and sabotage in the service of foreign powers, at a time when World War II already had begun; Mr. Mitchell and Mr. Kleindienst now claim for themselves the same power over domestic organizations like the S.D.S. or the Black Panthers, or over American citizens who attack the Government and its policies.

It is a vast leap forward in unchecked Government power over citizens if it is concluded that these two kinds of "threat" are the same, and justify the same response. In March, 1969, for instance, the Supreme Court pointed out that wiretapping without a court order had not been held unconstitutional in "foreign intelligence" cases—a term which clearly is narrower than "national security" and the use of which obviously drew a distinction between the two.

In fact, the constitutionality of eavesdropping without a warrant for either purpose has not as yet been upheld by the Court.

Mr. Mitchell's doctrine of unlimited eavesdropping powers is making its way toward Supreme Court disposition. In the meantime, his view of it ought to be kept in mind when his assistants make large claims for Government "self-discipline." They are asking us to set a goat to guard the cabbage patch.