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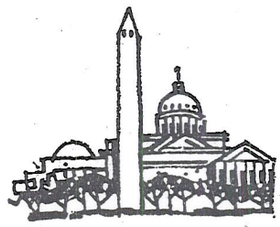
Washington Close-Up

A Fresh Start for Richard Kleindienst



By LYLE DENNISTON

Perhaps it was not intended that way, but the Supreme Court has just given the new attorney general a chance to start fresh on a major issue in federal law enforcement: eavesdropping.

Richard G. Kleindienst's arrival in the top Justice Department job was followed closely — as a coincidence — by the court's ruling this week against a "bugging" policy most closely identified with former Atty. Gen. John N. Mitchell.

Promptly, Kleindienst had federal agents turn off wiretaps and hidden microphones — perhaps several dozen of them — that had been picking up conversations of homefront "radicals" and tough-talking militants.

Of course, that action had real practical consequences, for privacy if nothing else. But it also was symbolically significant: it marked final defeat for the Justice Department after a three-year fight that Mitchell and the administration had chosen to wage against the courts.

Kleindienst had been around throughout that battle, and he had supported fully the position his superiors took on a secret monitoring, without a search warrant, of domestic "subversives." But, if he wished, he could now argue that it was not really his fight, since he was a subordinate in those days.

The Supreme Court has made it easy for him, at the very outset of his tenure, to make a new departure. It is within his power either to end or to persist in a kind of war on the judiciary about electronic snooping. If he ends it, he could help promote a more sensible debate in the country about the whole "bugging" question.

It has not been possible, for the past few years, for anyone in public life to get very far arguing one side or the other of the issue of electronic surveillance: the need for it, or the lack of need; the presence of or absence of practical utility in it; the risk or the gain of it.

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Those issues have been largely overwhelmed by an angry dispute over the Nixon administration's total unwillingness to have the federal judiciary as a partner in the management and control of secret listening.

This posture by the government really began within just a few weeks after the administration had come into office. It continued right up until it was struck down this week in an opinion written by one of the administration's own appointees to the Supreme Court.

At first, the unyielding view of the government that it could not trust the nation's courts with a sharing role in the electronic search field had seemed to be a temporary over-reaction to the policies left behind by the outgoing Johnson administration.

Ramsey Clark, the past administration's attorney general, had become a strong foe of surveillance by hidden listening devices, and he was proceeding to renounce that technique when his term of office ran out. The incoming Nixon administration wanted — as it did with so many of Clark's policies — to bring about a swift change.

So, when the Supreme Court, in March 1969, went far to curb the use of electronic snooping done without a judge's prior permission, the then-new Justice Department hierarchy reacted with fury.

It virtually threatened the justices with a policy of aggressive noncooperation in any attempt to find out about illegal, unauthorized surveillance, unless the justices changed their minds. But the court held fast, insisting upon the power of courts to probe into no-warrant eavesdropping in order to bar ill-gotten evidence from federal trials.

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Within a matter of a few months, it was apparent that the Justice Department, under Mitchell, had not been merely sputtering insincerely in its first reaction.

The Attorney General came forward with the argument, astonishing for its boldness, that the Constitution simply had nothing in it to limit the government's authority to eavesdrop, when Mitchell felt the need to protect national security, against feared "enemies" within or outside the country.

Restrictions in the fourth amendment, which said a search ought to be made on the basis of a court-approved warrant, did nothing to curb the president's "inherent power" — delegated to the attorney general — to save the country from subversion, Mitchell had contended.

When the argument was made in a lower court, the judges gasped, remarking that "the sweep of the assertion of the presidential power is breathtaking." The power, if conceded by the courts, would have left no role whatever for judges to keep electronic snooping inside any bounds, the lower court suggested.

Hoping to be somewhat more persuasive in the Supreme Court, the Nixon Administration abandoned that claim to unlimited executive branch power. But it merely found another way to state its case constitutionally — that is, that the fourth amendment allows "reasonable searches, and everyone can be assured the president and attorney general would be "reasonable" about their decisions to eavesdrop.

That too, has now been found waning judicially. Insisting firmly upon the power of judges to protect "four amendment freedoms" by controlling search warrants for electronic surveillance, the Supreme Court opinion by Nixon appointee Lewis F. Powell Jr. said simply that "the warrant clause is not dead language."

Kleindienst's first reaction — promising compliance — suggested that he had not been put off balance, as had his predecessor. It was an omen of cooperation, possibly an end to arrogance.