NYTimes JUN 25 1972 The Nation

Wiretaps:

Want to Bug? Tell it to The Judge

WASHINGTON — Henry Kissinger is so sure he's been wiretapped he wisecracks that he won't have to write his memoirs — he'll just publish the F.B.I.'s transcript of his telephone calls. Richard Kleindienst, when he was Deputy Attorney General, once had his office "swept" for listening devices. William P. Rogers, the Secretary of State, has been known to tell friends he can't discuss foreign policy over the telephone.

Though all of these officials undoubtedly agree with President Nixon's statement at his press conference last Thursday that wiretapping without court approval has been reduced under his Administration, they still harbor suspicions. And that fact reflects a very real national sense of near-paranoia that has grown out of the Government's insistence that it can wiretap—without asking or telling anyone—whomever it deems a threat to the nation's security.

Last Monday a major step toward clearing away those fears took place. The Supreme Court ruled that the Government might not use wiretapping against domestic radical groups without first obtaining from a judge a warrant, similar to a search warrant. The Court reserved judgment as to whether the same type of warrant was required before the Government might use wiretapping against foreign agents.

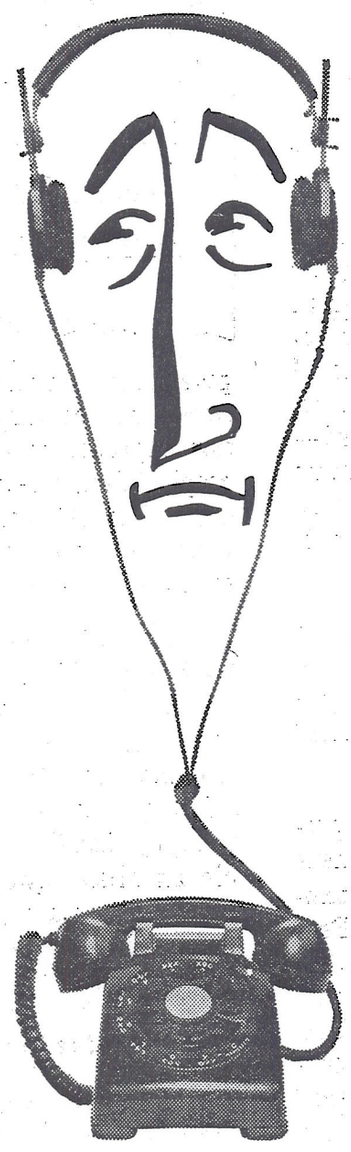
Within hours, agents in several Federal Bureau of Investigation offices switched off what Attorney General Richard G. Kleindienst characterized as "less than 10" recording machines that were linked by telephone lines to wiretaps or to microphones concealed in such places as residences, offices or hotel suites. He left in operation about 20 listening devices being used in so-called "foreign intelligence" investigations—reportedly, mostly taps on foreign embassies and other installations that might be contact points for spies.

It all began in 1940, when President Roosevelt secretly instructed Attorney General Robert Jackson to use wiretapping to counter any espionage efforts by the Nazi "fifth column." In 1946, Attorney General Tom C. Clark, without disclosing that President Roosevelt had directed his surveillance only at foreign agents, persuaded President Truman to let the F.B.I. use wiretapping against domestic subversives and major criminals as well.

In such ways did the secrecy surrounding "national security" wiretapping permit the use — and fear — of the Government's Big Ear to expand over the years, as agency after agency—Federal, state and local—followed the Executive's lead. By 1970, the Government used 97 wiretaps and 16 "bugs" — hidden microphones — in "national security" cases. It has never been disclosed how many of these were "domestic" and how many were "foreign," but Mr. Kleindienst indicated that the ratio was almost four-to-one in favor of "foreign" listening devices.

The legal turning point came in 1967, when the Supreme Court declared in Katz v. United States that governmental eavesdropping must be conducted within the Fourth Amendment's requirements of a warrant, designed to prevent unreasonable searches and seizures. The Court put teeth in this principle in 1968 with a ruling that if the Government illegally wiretapped, it must disclose to any defendant all transcripts obtained by such wiretapping, so that defense lawyers can know that no unconstitutionally obtained information is being used against their clients.

Congress responded in 1968 by passing a law making eavesdropping by authorities legal, so long as a wiretap warrant was obtained in advance. A judge had to be persuaded that there was probable cause to believe a crime had been or was about to be committed before granting such a warrant.



Thus law enforcement confronted a fundamental fork in the road, just as the Nixon Administration took over early in 1969: Should the Justice Department try to obtain warrants for its "national security" wiretaps, or should it proceed without warrants and gamble that the Supreme Court would agree that the Bill of Rights must give way when the President's advisers feel the national security is in jeopardy?

John N. Mitchell, then the Attorney General, chose to tap without warrants. He claimed that the President had the "inherent power" to wiretap any domestic groups "which seek to attack and subvert the Government by unlawful means."

But many lawyers argued that the Constitution's scheme of carefully delegated authority is antagonistic to broad "inherent powers" arguments. Moreover, if the President has the inherent power to ignore constitutional limitations of wiretapping, they asked, how about searches of homes? Coerced confessions? The right to counsel?

As the issue worked its way up toward the Supreme Court, the Justice Department dropped the embarrassing "inherent power" rationale. It argued simply that a wiretap is not "unreasonable" under the Fourth Amendment — even without a warrant — if the Attorney General considers it necessary to protect the country from domestic subversion.

Last week this argument failed to muster a single vote from the Supreme Court. Justice Lewis F. Powell Jr., a recent Nixon appointee, declared that the Fourth Amendment was designed for precisely such a situation as this — to prevent law enforcement officials from violating citizens' privacy unless a "neutral and disinterested magistrate" can be convinced it is necessary.

The decision reserved judgement as to whether warrantless wiretapping of foreign agents is constitutional. Mr. Kleindienst indicated that about 20 listening devices being used for this purpose were left in operation.

It was clear that many questions remained to be answered:

Will Congress pass a law designed to permit wiretap warrants in domestic security cases? Can the Supreme Court justify allowing warrantless wiretapping in "foreign intelligence" cases? If so, will the Government try to tap radicals on the ground they have links to foreign Communist regimes? Can radicals who have been tapped without warrants now sue Mr. Mitchell and Mr. Kleindienst for illegally wiretapping them?

Whatever the answers, Justice Powell made it clear that an important reason for last week's ruling was to calm uneasiness in high places and low that someone is listening. "By no means of least importance," he said, "will be the reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur."

—FRED P. GRAHAM