And Now a Right to Burgle?

The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake —the wind may blow through it—the storm may enter, the rain may enter —but the King of England cannot enter —all his force dares not cross the threshold.

In light of the invasion of the office of Daniel Ellsberg's psychiatrist by presidential forces, Senator Herman Talmadge was wondering whether Witness John Ehrlichman had any thoughts on the elder Pitt's famed celebration of the rights of the individual over the power of the executive. "I am afraid," said the former presidential adviser, "that has been considerably eroded over the years, has it not?" That bloodlessly arrogant candor was the climax of one of the most remarkable interludes of the televised hearings. Ehrlichman put forth a theory that would justify just about any presidential act, so long as it was done in the name of protecting the nation against a perceived danger to national security.

That contention in connection with one of "the plumbers'" burglaries so stunned the Senators that the investigation proper was sidetracked for a day to debate the matter, and the TV audience found itself getting a constitutional education from Sam Ervin, 76, and John Wilson, 72, Ehrlichman's crusty counsel. Noted as a criminal lawyer and former prosecutor rather than a constitutional expert, Wilson at times was so persistent in being heard that Ervin amiably protested: "But you are not a witness." In his half-century career, Wilson has helped Barry Goldwater win a libel suit against Publisher Ralph Ginzburg, and successfully aided Youngstown Sheet & Tube Co. in resisting an attempted seizure by President Truman. He does not approve of most conservative Republicans because "most of them aren't conservative enough."

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The September 1971 burglary attempt on Psychiatrist Lewis Fielding's office was entirely "within the President's inherent constitutional powers," said Ehrlichman. He added that after discussing "this with the President, he expressed essentially the view that this was an important, a vital national security inquiry and that he considered it to be well within the constitutional obligation and function of the presidency." That not only made Ehrlichman's claim sensational, but put him in apparent conflict with the President, who in his May 22 statement implied that the burglary was illegal.

Ehrlichman seemed to rely throughout on the accepted notion that in some situations the needs of the country must take precedence over individual liberties. In law, however, the new claim to a "right to burgle" rested insecurely on the vagaries of an extremely soft, unresolved constitutional issue: the extent of the President's inherent authority to protect the national security.

Though the President's powers are not extensively spelled out in the Constitution, Wilson argued that there was an implicit presidential "reservoir of power with respect to foreign intelligence, foreign leaks, this sort of thing." That was inherent, for instance, in the President's sworn duty "to preserve, protect and defend the Constitution," Wilson said, adding the words of a Supreme Court decision: "Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means."

Much was made by both Wilson and Ehrlichman of a provision in the 1968 Crime Control and Safe Streets Act, which stated that nothing in the act "shall limit the constitutional power of the President to take such measures as he deems necessary to protect the nation against" national security threats. But that phrase, as Wilson conceded, did not confer any fresh power on the President. Indeed the Administration had once argued that the phrase justified tapping the telephones of domestic security risks without a warrant, only to lose in the Supreme Court by a resounding 8-0 tally in the famous Plamondon case (formally known as *U.S.* v. *U.S. District Court*). Wilson nonetheless professed to find sustenance in even that decision, since Justice Lewis Powell had

specifically excluded foreign threats to security from the ambit of his opinion.

There has been no Supreme Court ruling on the permissibility of the Government's invading the privacy of individuals for foreign security purposes. Therefore, said Wilson, "it is not a silly proposition for us to contend that an entry into the psychiatrist's office" was not illegal in the circumstances. Those circumstances, Ehrlichman maintained, included rumored but unsubstantiated leaks to the Russian embassy of parts of the Pentagon papers and other materials *(see story page 22)*.

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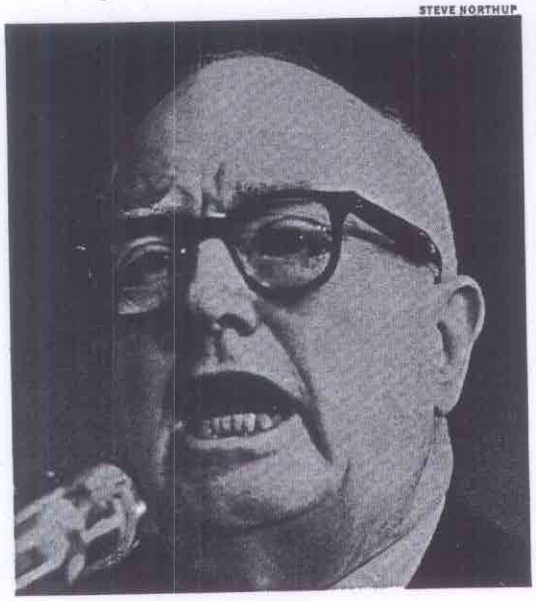

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Wilson's was an estimable demonstration of adversarial skills. But there was considerably less in this argument than met the ear. "Most dubious," said Harry Kalven Jr. of the University of Chicago, adding that the Wilson thesis amounts to a "wildcat discretion incompatible with the intentions of the Constitution." Berkeley's Sanford Kadish emphatically agreed: "That kind of thinking comes from the medieval doctrine that the king can do no wrong."

But what about the modern problem, asked Ehrlichman, of, say, an imminent nuclear attack and a safe-deposit box that contains key enemy plans? "Do we say a man's home is his castle, his safe deposit is his castle, and so let the bombs come?"

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There, exactly, was the rub. The Fourth Amendment bans only "unreasonable" searches and seizures, and the reasonableness of actions connected with impending nuclear attack can scarcely be compared with the reasonableness of a burglary of a psychiatrist's office more than two months after the Pentagon papers had leaked.

The permissibility of various actions shifts with the surrounding facts. Thus, as Columbia's Abraham Sofaer, a former U.S. prosecutor, notes, the FBI has often taken national security actions that are not strictly legal but are not sufficiently egregious to get the Government agents themselves in trouble. The issue in the plumbers' break-in falls farther along the spectrum: Was their action so grossly without justification that they should be prosecuted?

The Ehrlichman burglary argument seems even more tenuous given his insistence that neither he nor the President actually authorized the break-in anyway. So why did he raise it? Probably to lay groundwork in case he should be criminally charged in connection with the actions of his men.

Debate over the extent of presidential powers has a long history. Abraham Lincoln, in the extremes of the Civil War, went farther and actually claimed the right to ignore the law in order to save the nation. "Would not the official oath be broken," he asked, "if the Government should be overthrown when . . . disregarding [a] single law would tend to preserve it?" William Howard Taft took the other side, arguing that "the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of" authority. The danger of "an undefined residuum of power," he added, is "that it might lead under emergencies to results of an arbitrary character, doing irremedial injustice to private rights."

The attempted burglary of Ellsberg's psychiatrist's office seemed to many to fit exactly that description but lacked even the possible saving grace of an emergency to justify it—and hence was unworthy of the rich philosophical questions debated in the Senate Caucus Room last week.