The Right to Be Secure Post 5/30/74

TIME AND AGAIN President Nixon and his associates have advanced novel claims of autocratic power—and time and again federal judges have rejected those claims as antithetical to the basic tenets of constitutional government. The latest jurist to read the Constitution to some Nixon men is District Court Judge Gerhard A. Gesell. Last Friday, in a landmark preliminary decision in the "plumbers" trial, Judge Gesell emphatically ruled out any "national security defense" for the illegal break-in into the office of Dr. Lewis Fielding, Daniel Ellsberg's psychiatrist.

In so doing, Judge Gesell reaffirmed the primacy of the Fourth Amendment, which guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." That amendment, the judge declared, "is not theoretical." And he went on:

> *The security of one's privacy against arbitrary intrusion by governmental authorities has proven essential to our concept of ordered liberty. . . . No right so fundamental should now, after the long struggle against governmental trespass, be diluted to accommodate conduct of the very type the amendment was designed to outlaw.*

Thus Judge Gesell threw out one of the most pernicious doctrines which the Watergate mentality has promulgated—the notion that agents of the President may trample on citizens' civil rights with impunity under the banner of national security. That line of argument was advanced most memorably by former White House aide John Ehrlichman and his attorney, John J. Wilson, during the Senate Watergate hearings last summer. Mr. Wilson's launching pad was the landmark Supreme Court decision which outlawed warrantless wiretaps in domestic security cases. The Court had declined to discuss the limits of presidential power to wiretap in cases involving foreign intelligence. In a breathtaking bit of legal gymnastics, Mr. Wilson leaped from that judicial silence to the assertion that the President and his agents have inherent power to undertake any kind of invasion of a citizen's privacy which they deem necessary to the conduct of foreign affairs. Mr. Ehrlichman even declined to draw the line at murder where national security was involved. And President Nixon himself, while not going that far, expressed sympathy with this grandiose concept of inherent powers last August 22.

But Judge Gesell bought none of it. On the basis of statements by both Mr. Nixon and the defendants, Judge Gesell found that the President had not specifically ordered or authorized the "plumbers" to break into Dr. Fielding's office. Moreover, the judge concluded that the President has no authority to order such an illegal act at all. Contrary to Mr. Wilson's view, Judge Gesell found nothing in the wiretap decision indicating "an intention to obviate the entire Fourth Amendment." Even if some accommodation with foreign policy exigencies is required, he wrote, "it cannot justify a casual, ill-defined assignment to White House aides and part-time employees granting them an uncontrolled discretion to select, enter and search the homes and offices of innocent American citizens without a warrant."

In normal times, it would probably not have been necessary for a federal judge to lecture former White House aides so sternly on the meaning of the Bill of Rights. Under the present circumstances — given all that has been revealed about the Huston counter-intelligence plan, warrantless wiretaps and other White House abuses of power—such a judicial assertion of the rule of law becomes imperative. Judge Gesell's ruling means that the defendants in the "plumbers" trial may not wrap themselves in the blanket of "national security" to escape responsibility for their acts. The decision also has much broader impact as an important step toward redefining the legitimate boundaries of presidential power. Complementary efforts are under way on Capitol Hill, where Senators Nelson and Mathias, among others, are pressing legislation to eliminate the national security rationale entirely and require warrants for all wiretaps and other searches. Thus two branches of government, the judiciary and the legislature, are beginning to reaffirm what the executive branch forgot: that in a free society, the rights of citizens to be secure against governmental oppression must not be suspended at the whim of those in power.