

Ervin, Wilson: Colloquy

Following are excerpts from yesterday's Senate select Watergate hearing testimony, beginning with a colloquy between John J. Wilson, attorney for yesterday's witness, former top Presidential aide John D. Ehrlichman, and the Senate committee's chairman, Sam J. Ervin Jr. (D-N.C.), on whether or not the burglary of the office of Daniel Ellsberg's psychiatrist by White House agents was a legal extension of the President's powers to protect national security.

Ervin: I understand that Mr. Wilson wishes to address the Committee on the legal question I was discussing with Mr. Ehrlichman and Mr. Wilson yesterday, and without objection on the part of any member of the Committee, I will extend to him an opportunity to do so at this time.

Wilson: Thank you, Mr. Chairman . . .

Now, the state of the law today is that the point which I am arguing has not yet been passed upon by any court that I know of, but the Supreme Court has left the question wide open, if you please . . .

But there is a Senate report, 1096, I think it is, on the Safe Streets Bill of 1968 of which 2511 is a portion and, of course, as far as the Chairman is concerned, I know that this is old hat to him, but there is in the report a section on national security which recognizes a reservoir of power in the President of the United States with respect to foreign intelligence, foreign leaks, this sort of thing . . .

Now . . . 21 years ago I was in the steel seizure case . . . In that case I fought vigorously against the inherent power of President Truman to seize the (steel Mills) . . . and the Supreme Court, as you know, sustained our contention, that there was not a package of inherent powers in President Truman

on Constitution . . .

to make that seizure.

Now, this case is unlike that case because there is a reservoir of constitutional power recognized at least hypothetically by the (Safe Streets) bill which was passed . . .

Both Sen. McClellan who, I believe, was the chairman of the Judiciary Committee, and Sen. Hart, were quoted in their debates on the floor, and they make it plain that Section 2511 was not intended to restrict or extend the power of the President. It was simply a reserving clause with respect to whatever power he had.

Now . . . my reading of the Supreme Court's decision in the Plamondon case is that in a domestic security case, and that was that case . . . that Plamondon bombed the CIA headquarters in Chicago, it was treated by the Supreme Court time and time again as a domestic security case, . . . that the Supreme Court said "We are not passing upon the power of the President with regard to foreign intelligence."

. . . coming directly to how I read the Plamondon case, and it is extremely interesting that I don't remember ever reading before that the Supreme Court would call upon the oath of the President in the Second Article of the Constitution, the fourth clause, as a source of power. As you know, it says to preserve, protect and defend the Constitution of the United States, and I have not found, perhaps the Chairman is way ahead of me on this, I have not found

any case where a source of Presidential power has been drawn from the language of the oath.

But whether it has before or whether it has not, the imprimatur of the Supreme Court through Justice (Lewis) Powell has not been put upon the language of the oath as a source of power, and it is a source of power, as the Court says, and I will read the beginning of this paragraph, "We begin the inquiry by noting that the President of the United States has the fundamental duty under Article II Section I of the Constitution 'to preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our government against those who would subvert or overthrow it by unlawful means." And it goes on to say in the exercise of that power the Attorney General may be authorized to authorize permissions to tap wires.

Now mind you this case ends up with the result that because the tapping in this case, with the approval of the Attorney General, and on the basis, let's say, of the philosophy of 2511 (of the Safe Streets Act), the Supreme Court said that because it involved domestic security it did not abrogate, supersede or otherwise lay aside the Fourth Amendment. But the question is wide open, if you please, as to whether, in the case of foreign intelligence, the



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Wagging his fingers to put quotation marks around the term, Sen. Howard Baker talks about "presidential power."

cloak of the Fourth Amendment wraps itself around the President and requires prior judicial action.

Now, 2511 has had the effect of saying that in certain instances mentioned therein the President will not violate the wiretapping law by proceeding to tap for purposes stated in there. It goes on to say that the taps which are obtained are admissible in evidence and are not subject to the—I am adding this—are not subject to judicial attack . . .

Now, nobody can dispute me on one point, and I am sticking my neck way out, that the Supreme Court reserved the question of the use of the reservoir of, a possible reservoir, let me put it that way, of Constitutional power reposed in the President to violate the law

in respect of foreign intelligence, foreign espionage, foreign collaboration. That is in here. I can turn a half dozen times to Justice Powell's position in making it clear that he was not deciding that question.

Now, my position is that if there is this reservoir of power, and your own (the Senate Judiciary) committee, sir, in reporting out the Safe Streets Act bill in 1968 was willing to give an indication that there existed a reservoir of power for the purpose of, what I say, and this is my language, for the purpose of permitting the President to otherwise—to do what would otherwise be a crime, to protect the nation against foreign intelligence and for the purpose of obtaining foreign intelligence.

Now, I know I am open to

the attack, well, can he shoot somebody on the street, I am not going that far, and that is driving myself to a conclusion ad absurdum. As you know, as you all know, wiretapping is a form of invasion of the premises of the person who is overheard . . .

So that we have squarely—we are not driving this problem any further today than saying that it is not a silly proposition. Mr. Chairman, you didn't call it silly, you maybe feel it was but you didn't say it—it is not a silly proposition for use to contend that an entry into the psychiatrist's office under grounds which would technically (be under state law) burglary, because there is no federal crime in that respect, is no different from an entry through his tele-

phone system, and if your committee—and by your committee, I am not speaking of this august body, I am speaking of another august body, that is the Judiciary Committee, and I don't find that you, sir, or anyone else dissented from the philosophy of the report of the Senate which went out on the floor in support of that bill, that there is very likely a reservoir of constitutional power unlike the steel case, in the President in the matter of national security . . .

There is no one living . . . who can assert with categorical certainty that the President of the United States does not have the Constitutional power to cause the entry under what would be otherwise illegal circumstances in pursuit of foreign intelligence, and I say again without fear of contradiction, that we are entitled to consider when we get to that point, that the Fourth Amendment may have vanished from the scene.

Ervin: Well, Mr. Wilson, I

have enjoyed your argument . . .

I agree with your interpretation of the (Plamondon) case . . . In this case, the Government was taking a position which was long maintained by former Attorney General Mitchell, that the President had inherent power to exercise surveillance without a warrant from any court in respect to protecting against domestic subversion. And, of course, in the case you referred to, the Government took the position that Section 2511.3 (of the Safe Streets Act) argued that except in national security surveillance, this warrant requirement, the Congress recognizes the President's authority to conduct such surveillances without prior judicial approval.

Justice Powell said Section 2511.3 can't find no power as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such powers as the President may have under the Constitution . . . we therefore find the conclusion unacceptable that Congress intended to make clear that the Act simply did not legislate with respect to domestic security surveillances.

I served on the Judiciary Committee when Section 2511 . . . was drawn, and of course, if we had not put this in there, the same thing would have resulted, because Congress could not take away any constitutional powers of the President. So they put that in there because there was a controversy between some members of the Committee having an opinion that the President almost has powers that would make an eastern potentate turn green with envy, and some people, like myself, on the Committee felt that the Constitution limits and defines the powers of the President.

Some people believe in a

doctrine of inherent powers. I do not believe the President has any power at all except such as the Constitution expressly gives him or such as are necessarily inferred from the expression of those powers. I think the Constitution was written that way to keep the President and, of course, the Congress, from exercising tyrannical power . . .

Where you and I part company is on the facts.

I think we have a rather anomalous situation here. Here was the government — they were not prosecuting (Daniel) Ellsberg through the agents of the Department of Justice for giving papers to Russia. They were just merely charging him with stealing some papers . . .

And here were some employees of the White House that go out and for some strange reason, I guess, trying to further — they did not trust the Justice Department to do the prosecuting all by itself. So they decided they ought to go and try to steal some documents from the doctor of a man who was being prosecuted for stealing from the government, which is quite a peculiar situation, really.

Now, I cannot see the slightest relationship between Dr. Fielding's I believe his name was, notions of the mental state of Daniel Ellsberg and foreign intelligence activities. The only activity I think the doctor was engaged in was trying to determine what the mental state of his patient was. He was not engaged in any foreign intelligence activities, and I think — this is my interpretation of the Constitution — I think that the emissaries that were sent out there for the plumbers to try to steal the doctor's notes were domestic subversion and not in defense of this country against foreign intelligence activities.

Now, I think your steel case, which I think is one of the remarkable cases, they

held in that case, and I am sure largely on the basis of a very persuasive argument that you made, that the President, even though the U.S. was engaged in war in Korea and needed steel in order that the men fighting that war might have weapons and munitions.

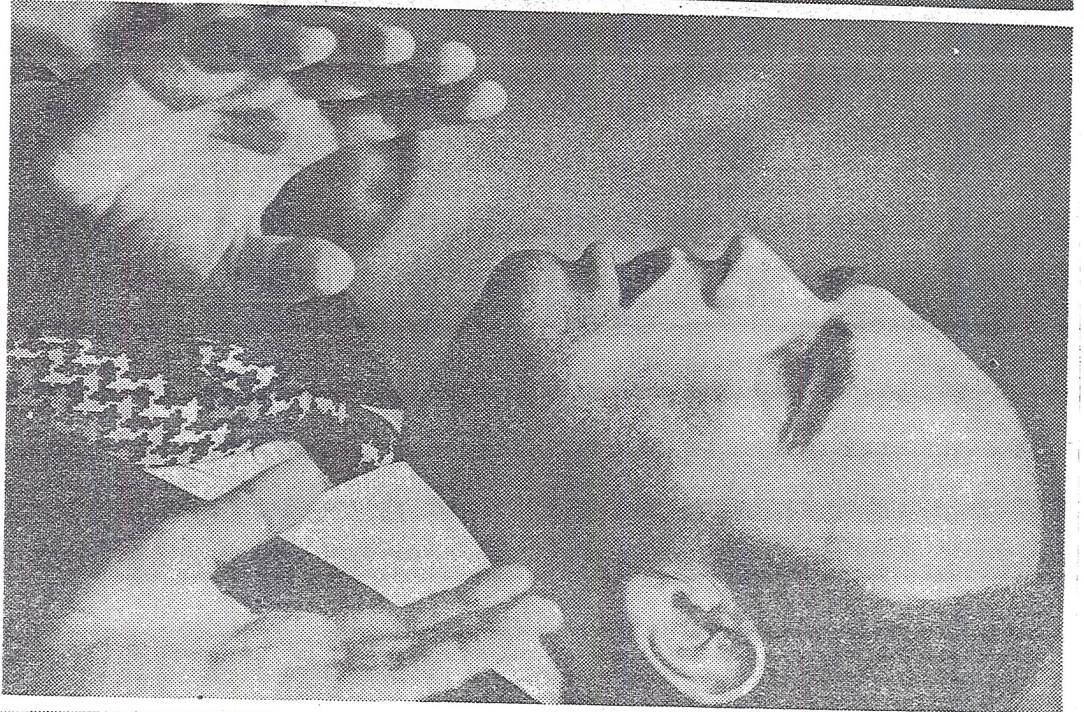
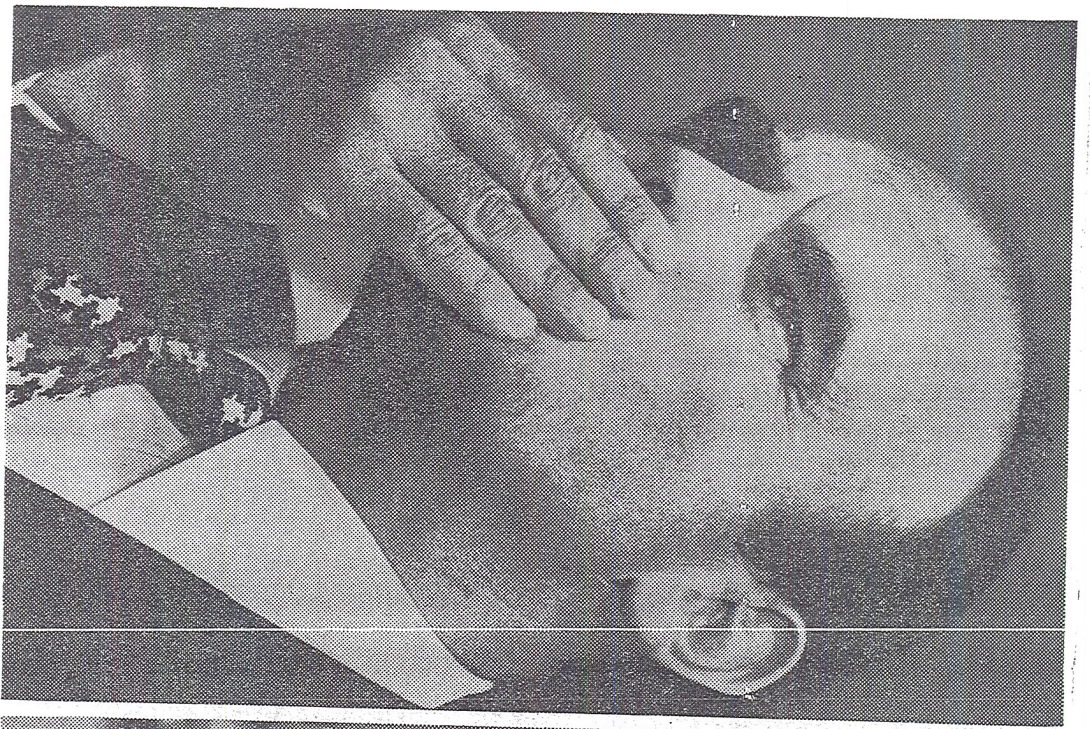
And even though industrial disputes were about to close down the source of that steel, namely, the steel plants, they held that the President of the U.S. did not have any inherent power under the Constitution to seize steel mills for the purpose of securing a flow of munitions and weapons to American soldiers locked in battle with a foreign force. And I think that is pretty persuasive authority, if that is so.

If the President does not have any inherent power under the Constitution to seize steel mills in order that he might carry on a war and furnish the weapons and munitions that will enable the soldiers to fight and prevent destructions of themselves at the hands of the enemy, I think that is authority that if the President would have no inherent power to seize steel mills in time of war to carry on the war, he has no inherent power to steal a document from a psychiatrist's office in time of peace . . .

Wilson: May I reply?

In . . . the Plamondon case, Justice Powell puts a footnote between domestic security and note that it is difficult sometimes to find the line between foreign security. National security is a broad word. It is a misleading word in itself, because national security might envelop both . . . I think if you will go back to my symbol, 2511, you will see that the Chairman's Committee on the Judiciary reposed in the President his own absolute discretion by use of the words "He deems necessary to protect the nation."

So that I am arguing that when it comes to the exercise of this reservoir of



John Ehrlichman, former adviser on domestic affairs to President Nixon, ponders, makes a point and listens during the Senate hearing.

Photos by Frank Johnston—The Washington Post

power in a foreign intelligence case, and I want to come to the facts for a moment on that quick, that in that case, it is the President's discretion which is to be guided.

Now, there is testimony here by Mr. Ehrlichman that the Russians either had or were getting this information. Now, this isolation that the Chairman puts Mr. Ellsberg and his psychiatrist in is, I submit—I am looking for a general adjective, Mr. Chairman. I would say that it is unfair for you to do that, if you will forgive the briskness of that observation.

The genesis of this was either the fact that the papers that were passed to the Russians or that there was reasonable ground to . . . believe that they were going to the Russians. Now, this puts a cap of foreign intelligence, not even an umbrella, a complete cloak upon this whole transaction?

Following up on this discussion, Sen. Herman Talmadge (D-Ga.) questioned Ehrlichman further about the Ellsberg psychiatrist burglary and the question of national security:

Talmadge: Now, in matters involving national security, could the President authorize a forgery?

Ehrlichman: Well, again, you are getting me into an area that obviously is a subject for the experts . . .

Talmadge: You do not think he could authorize murder, do you?

Ehrlichman: I do not — as I say, I do not think I am the one to try to respond to that kind of question as to where the line is.

Talmadge: Well, you authorized the break-in, did you not? I was, I was trying to—

Ehrlichman: No, sir, I did not.

Talmadge: You affirmed it yesterday in a memorandum that I saw . . .

Ehrlichman: No sir, I submit that that is not what that memorandum says. . .

What that memorandum says is that the investigation which had previously been authorized by me should also include an attempt to ascertain the contents of these files. There is nothing

in there about the means to be pursued, and my testimony was, and continues to be, that my assumption was that that could be done by completely conventional investigatory means.

Talmadge: I will read the language: "Convert operation to be undertaken to examine all of the medical files still held by Ellsberg's psychiatrist"

How do you think you could examine all the medical files without a break-in?

Ehrlichman: Well, it has occurred to me since because I have been asked this question before, that one way that it could be done is through false pretenses, through or through perfectly honest—

(Laughter)

—perfectly honest means, one doctor to another, by recruiting the assistance of another psychiatrist or of a doctor or of a—someone who could get at them that way . . .

I am not a trained investigator, Senator, and what I know from my own experience is that people who are investigators, as I mentioned yesterday, insurance adjusters, people of that kind have over the years brought to attorneys information of this kind which

they have been given the assignment of gaining. It simply was not in contemplation that a break-in, as such would be engaged in . . .

Talmadge: What relationship did Dr. Fielding (Ellsberg's psychiatrist) have with national security?

Ehrlichman: Well, the CIA perfected a technique, as I understand it and again I am not your best witness on this, in which they can find out a lot about a foreign agent, a foreign official, someone who is the object of their investigation through the device of what they call a psychiatric profile. Two people in this special unit, Mr. (David) Young and Mr. (E. Howard) Hunt had both had experience with the use of these profiles in the past, and they felt strongly that in this case, where there were so many unknowns, we did not know whether we were dealing here with a spy ring or just an individual kook or whether we were dealing with a serious

penetration of the nation's military profile of this kind might, certainly not positively, but right, add some important additional ingredient which would help to understand the dimensions of the problem.

Talmadge: You do not think—

Ehrlichman: Sir, I cannot vouch for this. I have a kind of an inherent personal doubt about the psychiatry in general, but I cannot second-guess, I cannot second-guess the investigation experts who have used this technique and, as I say, the CIA maintains a staff and they do this thing on a regular basis and it is used in our Government.

Now, I understand from testimony before the McClellan Committee that the CIA's position is that they have not ever used it before in a case of espionage involving a United States citizen. I do not know whether that is so or not. But in any event, the people involved here were very concerned about what they were dealing with, and they felt that this would be a helpful technique.

Talmadge: You did not think that Dr. Fielding was a security risk to the country, did you?

Ehrlichman: Of course not, no. The identity of the individual here had nothing to do with it, the doctor. The CIA had prepared a psychiatric profile, and it was not helpful.

And when Mr. Young went back to the CIA and said, "This is not helpful, they said, "Well, we do not have enough raw material to go on. You are going to have to get us some more factual information," and so this was then an expansion of the original covert investigation of this individual and his co-conspirators and his pattern and how he got these documents and so on to include the assemblage of such other information as might be helpful to the CIA in finishing this psychiatric profile project . . .

Talmadge: Now, did the President authorize that break-in?

Ehrlichman: Not in express terms, no sir. At least not to my knowledge.

Talmadge: As a matter of