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The Constitutionality of a Burglary

The testimony of John D. Ehrlichman has been interspersed with some of the most astonishing assertions of law and fact that have ever been offered in justification of a crime. In essence, Mr. Ehrlichman would have us believe that although the President did not order the burglary of Daniel Ellsberg's psychiatrist's office, he had power under the Constitution to do so. Thus, to the list of assaults our sensibilities have suffered through the Watergate and related scandals, we must now add the doctrine of constitutionally sanctioned burglary. Sen. Sam Ervin seemed as stunned at this extraordinary assertion as anyone else and thus permitted Mr. Ehrlichman and his lawyer, John Wilson, an extended opportunity to elaborate their theory.

The first thing to be said, in fairness, is that Mr. Ehrlichman dnies, despite some rather pointed language in a memorandum bearing his approval, that he ever authorized a burglary. It was his zealous assistant, Egil Krogh who did that, he says. Nevertheless, Mr. Ehrlichman and his lawyer have dredged up some irrelevant language in a Supreme Court wiretap opinion and a section in a statute dealing solely with wiretapping to make the point that neither the Supreme Court's language nor the statute was designed to limit the President's power to protect the nation from foreign enemies. It is this power, they argued, which the President could have invoked, had he chosen to do so, to lawfully order the burglary of the psychiatrist's office. The argument is ridiculous.

As Senator Ervin correctly pointed out, there is nothing in either the statute or the Supreme Court's language that permits the President to suspend the Fourth Amendment's prohibition against illegal searches and seizures any time he gets nervous about foreign conspiracies and their threats to national security. The Ehrlichman-Wilson argument is a way of saying that anything goes just as long as those two magic words *national security*—as the White House chooses at its convenience to define them—are invoked.

The absurdity and the danger of the proposition are immediately apparent when you examine the facts which this specious doctrine attempts to justify. Mr. Ehrlichman testified that the White House investigation of Dr. Ellsberg was undertaken because J. Edgar Hoover drew the line in the investigation of Dr. Ellsberg at the doorstep of his friend, Louis Marx, Dr. Ellsberg's father-in-law. Messrs. Evans and Novak report on the opposite page today that Mr. Marx was, in fact, interviewed by the FBI and that little came of it. There is other evidence to support their account. In addition, they report that the Ellsberg case had special status within the FBI and was receiving the highest priority.

It is already a matter of record that the FBI had an intense interest in Dr. Ellsberg dating back almost two years before the burglary of Dr. Fielding's office and antedating the publication of the Pentagon Papers by almost as long. It is also clear that Dr. Ellsberg had about as wide an acquaintanceship both inside and outside government as any American of his generation. His dealings with newspapers, senators and defense officials prior to the publication of the Pentagon Papers were widespread. The court battles concerning publication of the Pentagon Papers had been completed—with a refusal to restrain publication—a full two months prior to the break-in, and Dr. Ellsberg already had been indicted.

In a word, then, by the time of the break-in, the facts regarding Dr. Ellsberg's activities in that connection and those regarding his purposes, associations, character and state of mind were no great mystery. Still less could they reasonably be the cause of the great panic which apparently gripped the White House about the threat to national security proceeding from the leak of the Pentagon Papers. This was not the "largest raid" in history on secret government documents, as Mr. Ehrlichman would have us believe. It was not even a raid. It was a leak by somebody not even in government of documents which were no longer exclusively in the hands of the government, and this fact almost immediately became known. It was a once-in-a-millenium happening born of a unique effort to bundle together a historical record of the Vietnam War and of a gross failure to maintain adequate control over the end-result.

Leaving this aside, and accepting as valid the administration's anxiety, the critical question is whether the FBI was lax in its investigation of Dr. Ellsberg—for this charge forms the basic White House justification for establishing the "plumbers" unit and for all that followed. The White House and Mr. Ehrlichman would have us believe that J. Edgar Hoover did not have his heart in this case and that the FBI was not up to the job. The rights or wrongs of this claim should not be hard to prove for the evidence is not under lock and key at the White House. It can be found at the FBI where there are agents who worked on the case, and it can be found among senior officials either still on duty or retired. These men can tell the Ervin committee the full details of the bureau's handling of the Ellsberg case—the number of agents assigned to it, the number of interviews, and all the rest. The White House has not been reluctant in the past to reveal such information when it suited its purposes. In our view, the adequacy of the FBI's handling of the Ellsberg case is so central to Mr. Ehrlichman's testimony and to the President's extraordinary case for condoning the burglary of Dr. Ellsberg's pyschiatrist in the name of "national security," that the appropriate present and former officials of the FBI should be immediately called before the Ervin committee to give their testimony.

This would not settle the constitutional issue in the case; the courts will have to do that. But it would go a long way to show whether, in the performance of the FBI, the President to begin with had any good reason to establish his own secret police unit and to resort to so radical a concept of his inherent constitutional powers.