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Point at Issue: The Right to Burglarize

By Frank Johnston—The Washington

Senator Ervin and lawyer John J. Wilson: differing views on what the U.S. Constitution means.

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There is an old axiom that the law says whatever lawyers want it to say. Each party to any legal dispute can invariably find support for his position in the Constitution, the statute books and previously decided cases.

The principle is being stretched to its limits this week, in the midst of the Senate Watergate hearings, as high-powered lawyers—a former presidential aide, a U.S. senator and a distinguished litigating attorney—fight over a fundamentally troubling question:

Did President Nixon, or assistants working on his behalf, have an implied power or a legitimate right, in the name of "national security," to burglarize the office of Daniel Ellsberg's psychoanalyst?

John D. Ehrlichman, once Mr. Nixon's chief domesitc adviser, while disclaiming any responsibility for the burglary, says the action was legal.

His attorney, John J. Wilson, who was 72 yesterday, one of Washington's most experienced trial lawyers, finds support for that position in the President's oath of office and in the Omnibus Crime Control and Safe Streets Act passed by Congress in 1968.

But Sen. Sam J. Ervin Jr. (D-N.C.),

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chairman of the Senate Watergate Committee, insists that no such justification exists and that the burglary was a gross violation of the Fourth Amendment to the Constitution, which prohibits "unreasonable searches and seizures."

As usual, the ultimate answer is not very clear.

And there is a particular irony to the debate, because both Wilson and Ervin once forcefully took positions that could be interpreted as contradicting what they now say.

Wilson, as the attorney for a steel company, argued before the Supreme Court in 1952 that President Truman had overstepped his powers by ordering federal seizure of the nation's steel mills to guarantee munitions production during the Korean War.

Ervin, as a member of the Senate Judiciary Committee, voted in favor of portions of the 1968 crime bill granting the President broad powers, which the Justice Department warned at the time might later be "easily abused."

These are the legal provisions at issue:

• The Fourth Amendment, which says that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Exactly what the amendment means is a subject of ongoing dispute, of course, with policemen often executing searches that are later protested, and with the Supreme Court specifically having refused to say that it prohibits wiretapping.

Lawyers differ on whether the search of the psychiatrist's files was "unreasonable" and whether it violated Ellsberg's personal rights.

• The implied executive powers of the President, which the Founding Fathers left vague when they wrote Article II of the Constitution.

The seventh clause of that article spells out the President's oath of office, in which he swears that "I will faithfully execute the office . . . and will, to the best of

my ability, preserve, protect and defend the Constitution of the United States."

Courts have long struggled with the task of defining what presidential acts are legitimate in that framework.

• The 1968 crime bill, which spelled out procedures for court-authorized government wiretapping, but included a clause noting that Congress was not limiting "the constitutional power of the President to take such measures as he deems necessary to protect the nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities."

Congressional debate on the law makes it clear that the bill was not intended to expand presidential power, but the Justice Department, then headed by Attorney General Ramsey Clark, cautioned that its wiretapping provisions might be abused in "national security" cases involving "domestic" threats to the country. The Senate majority, with Ervin, rejected the argument.

These are the Supreme Court cases that have been invoked during the current dispute:

• Ex parte Milligan, an 1866 decision in which the high court ruled that President Lincoln had no power to institute trial by military tribunal during the Civil War in localities where the civil courts were still operating.

One newspaper, praising the decision at the time, editorialized that it showed "even the President of the United States cannot give an order, or enforce a decree, against the law of the land, and that his illegal orders are no protection to his subordinates."

• Youngstown Sheet & Tube Co. et al v Sawyer, commonly known as the steel seizure case, in which the court rejected President Truman's argument that his position as commander in chief of the armed forces entitled him to take over the steel mills.

The late Justice Hugo L. Black, writing the 1952 majority opinion, observed that "the founders of this nation entrusted the lawmaking power to the Congress alone in both good and bad times."

Wilson, who now presses an expansive view of presidential power, was on the winning side of that controversial case.

• U.S. v U.S. District Court, in which the court ruled last year that the Nixon administration had abused its authority by interpreting the 1968 crime bill to permit wiretapping without court order in "national security" cases.

Justice Lewis F. Powell, a Nixon appointee who delivered the court's unanimous opinion, said that "official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech."

The opinion left open, however, the question of what the President could do "with respect to activities of foreign powers or their agents."

Ehrlichman and his attorney contend that the break-in at the psychiatrist's office in September, 1971, was justified by information the government then had that the Soviet embassy here had obtained a copy of the Pentagon Papers previously disclosed by Ellsberg.

Another case decided by the Supreme Court last year, growing out of further disclosures of the Pentagon Papers by Sen. Mike Gravel (D-Alaska), noted that "third-party crimes" might cancel out a legislator's immunity from investigation.

Some lawyers contend that this principle, applied to the Ellsberg burglary, removes any right of the President to justify it in terms of his implied powers.

The Ehrlichman-Wilson position concerning the burglary assumes a particular set of circumstances:

• That national security was genuinely threatened by disclosures of the Pentagon Papers. (The Supreme Court ruled on June 30, 1971, that the government had failed to make that case in its efforts to obtain court orders against newspaper publication of documents.)

• That Ellsberg was believed to have been involved in passing the documents to the Soviet embassy. (The FBI established almost immediately that there was no evidence that Ellsberg was involved in that incident, according to The Washington Post's sources.)

• That relevant information could have been obtained from the psychoanalyst's files. (Psychoanalysts rarely keep files that would reveal information about a patient to an outsider, except how often he visited the doctor.)