

COLSON ATTORNEY DEFENDS BREAK-IN

Asks Permission to Argue
That National Security Was
at Issue in Burglary

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WASHINGTON, May 20—An attorney for Charles W. Colson, contending that the law on searches without warrants was "less than crystal clear" in 1971, argued today that the six defendants in the White House "plumbers" case had a right to defend themselves on the ground that their burglary of the office of Dr. Daniel Ellsberg's former psychiatrist was a national security operation authorized by the President.

The attorney, David I. Shapiro, announced in court that he had subpoenaed J. Fred Buzhardt Jr., the White House counsel, to testify tomorrow about what classified documents would be readily available to show that there were legitimate security concerns involved in the plumbers' investigation of Dr. Ellsberg.

Judge Gerhard A. Gesell of United States District Court reserved decision on the national security issue until attorneys for the special Watergate prosecutor's office have rebutted the argument tomorrow, but the judge repeatedly expressed skepticism about Mr. Shapiro's approach.

"I haven't seen anything that says there is any right to bust into someone's home and take papers," Judge Gesell said at one point.

Jaworski Opposes Stand

In a brief filed last week with the court, Leon Jaworski, the special prosecutor, also attacked the national security defense in the case, arguing that "it is hard to imagine a more patent and culpable violation of the Fourth Amendment than this carefully plotted secret night-time break-in."

Today, William H. Merrill, an associate Watergate prosecutor, depicted the issue as that of a simple burglary. "That's what this case is all about—law and order," Mr. Merrill said.

The six defendants, including Mr. Colson and another former White House aide, John D. Ehrlichman, were indicted by a Federal grand jury last March for their role in conspiring to commit burglary at the Beverly Hills, Calif., office of Dr. Lewis Fielding, who had been Dr. Ellsberg's psychiatrist. The break-in took place on Sept. 3, 1971.

At the time, Dr. Ellsberg—who earlier had publicly said

he provided the Pentagon papers to The New York Times—was one of the key targets of the special White House investigative unit authorized by President Nixon in July, 1971. The group's members were nicknamed "plumbers" because of their mission to stop leaks of information to the newspapers.

In a letter made public by Judge Resell this afternoon, President Nixon again noted that he had not authorized the Fielding break-in but added that "it was my intent, which I believe I conveyed, that the fullest authority of the President under the Constitution and the law should be used if necessary to bring a halt to newspaper leaks in 1971." The gist of Mr. Nixon's letter was reported last week by The Times.

During his presentation today, Mr. Shapiro attempted to show that recent Fourth Amendment decisions had left open the question of whether a President could authorize a break-in without a warrant for the purpose of obtaining or protecting foreign intelligence. He also argued that the President had "inherent power" to delegate the authority for such break-ins.

In a brief submitted to the court, Mr. Shapiro summed up what he and Judge Gesell agreed was the "nub" of the issue before them.

"In sum," Mr. Shapiro wrote "if this court holds as a matter of law that in 1971 it was at least arguable that (1) the President had the authority to conduct foreign intelligence searches and (2) the President could delegate that power to one of his chief assistants, and if this court further holds (3) that the search undertaken was within the scope of the authority so delegated, then a hearing must be held to determine (4) whether there were substantial and legitimate national security considerations which formed the primary purpose of the search."

Mr. Shapiro said that if the court found such valid considerations, "this indictment must be dismissed."

Other Arguments Heard

Along with the national security debate, Judge Gesell heard a series of oral arguments today on other pretrial motions and gave indications that he would respond favorably to a request that Felipe de Diego, one of the defendants, be freed because he had been granted immunity by state officials in California and Florida as well as by Federal officials here before being indicted in the Fielding case.

Judge Gesell also expressed annoyance with one of the perjury charges brought against Mr. Ehrlichman by the special prosecutor's office. The issue arose over a statement Mr. Ehrlichman made about the Pentagon papers case to an agent for the Federal Bureau of Investigation.