

fact, in a subsequent statement he expressly denied it, didn't he?

Ehrlichman: I read his statement, and I have heard testimony here. I would not be totally responsive to your

question, however, if I did not add one thing, Senator.

On the 24th of July (1971) I sat in a meeting where the President gave Mr. Krogh his charter, his instructions. I must say that the President put it to Mr. Krogh very strong that he wanted Mr. Krogh and the people in this unit to take such steps as were necessary and I can recall in that conversation specific reference to the use of polygraphs and summary procedure for the discharging of Federal employees who might have been involved in this episode.

Talmadge: Let me read the President's own language to you taken from the Congressional Record of May 23, 1973. "Consequently, as President, I must and do assume responsibility for such acts despite the fact that I, at no time, approved or had knowledge of them." And he was talking about the break-in of Fielding's office.

Ehrlichman: Senator, I think it's important in that same connection, however, to read the previous two paragraphs which say:

"At about the time the unit was created Daniel Ellsberg was identified as the person who had given the Pentagon Papers to the New York Times. I told Mr. Krogh (this is the President speaking) that as a matter of first priority the unit should find out all it could about Mr. Ellsberg's associates, and his motives. Because of the extreme gravity of the situation and not then knowing what additional national secrets Mr. Ellsberg might disclose, I did impress upon Mr. Krogh the vital importance to the national security of his assignment.

"I did not authorize and had no knowledge of any illegal means to be used to achieve this goal. However, because of the emphasis I put on the crucial importance of protecting the national security I can understand how highly motivated individuals could have felt justified in engaging in spe-

cific activities that I would have disapproved had they been brought to my attention."

Now that refers to this July 24 conversation between the President and Mr. Krogh, and I must say that I think that is a fair characterization of the urgency which the President expressed to Mr. Krogh and undoubtedly a recognition of the fact that one in Mr. Krogh's situation might well believe that he had been charged with taking extraordinary measures to meet what the President described in very graphic terms.

Now, you should also note that at this same time the Strategic Arms Limitation Treaty negotiation documents had been compromised, so that the President, by the 24th of July, knew that his negotiating position versus the Russians in the Strategic Arm Limitation Treaty negotiations were known to the Russians and literally the negotiations had been compromised.

He discussed with Mr. Krogh in very graphic terms the disadvantage in which he found himself now in trying to conduct this country's foreign policy and work out this arms limitation having had these secrets displayed

Talmadge: Isn't it a fact that the (Ellsberg psychiatrist) break-in occurred more than 60 days after

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TEXT, From A28

publication of those papers in The New York Times?

Ehrlichman: Oh, I think two things have to be said here: One, the investigation was not to prevent the newspapers from publishing the Pentagon Papers because that was, of course, an accomplished fact. The investigation here was to find out who had stolen top secret documents, and disseminated them, not only to the newspapers but, and we had at the time strong reason to believe that the documents delivered to the Soviet Embassy were not the same documents as were printed in The New York Times.

I think you know, Senator, that there was a disparity,

there was a difference between what was printed in some of the newspapers, on the one hand; and what was, for instance, delivered to the Congress, on the other, and there were actually about three different versions of these documents in existence and by versions, I mean different documents in different sets going around, and so it was entirely reasonable to believe that the Soviet Embassy had received more sensitive documents than those that had been printed in The New York Times.

But the main point here is that the investigation was not to stop the publication in the newspaper. The investigation here was to determine how so many vital top secret documents could get out of the Federal Government and into the hands of a foreign power.

Talmadge: Assuming for the sake of argument that you are entirely correct on your legal premise, which I don't, I could conceive of a break-in on Ellsberg but I can't conceive of a break-in on his doctor who had nothing whatever to do with national security.

Ehrlichman: I understand. As I have said before, Senator, the investigative technique here of the psychiatric profile required information, just as the determination of who the coconspirators were required various kinds of information.

Now, you might go to a service station attendant to get information about who Mr. Ells-

berg's friends were. That does not mean necessarily that the service station attendant was a coconspirator or certainly there is no suggestion here that the psychiatrist was in any way a coconspirator. He was the holder of what they considered to be important investigation information as I understand it.

Sen. Edward Gurney (R-Fla.) then questioned Ehrlichman about the reported offer of executive clemency to Watergate conspirator Hunt:

Gurney: One of the important pieces of testimony in this hearing, Mr. Ehrlichman, involves the whole matter of executive clemency, whether the President actually authorized anybody to offer executive clemency to any of the defendants . . .

First of all, did you have — your logs show that you

not in pointed terms with Mr. Colson but just generally, was that I did not think anybody ought to talk to the President about this subject, outsiders or staff people, that it is just a subject that should be closed as far as the President is concerned.

In the afternoon session, Sen. Daniel K. Inouye (D-Hawaii) questioned Ehrlichman about the break-in at the Los Angeles office of Dr. Lewis Fielding, Ellsberg's psychiatrist:

Inouye: When you heard of the Fielding break-in, did you disassociate yourself with that activity and admonish those who were responsible?

Ehrlichman: Yes sir.

Inouye: Did the President do likewise?

Ehrlichman: No, I don't think so. The President had no reason to, because I don't think he was informed of it . . . The first specific recollection I have of discussing this subject with the special unit activity with the President was in March of this year. Now, I may have

had some conversation with him previous to that date, but I have no recollection of it . . .

Inouye: Why didn't you do something about Mr. Hunt and Liddy? There is nothing in the record to show that were admonished or they were punished or they were put in bad graces.

Ehrlichman: Hunt and Liddy, as far as I assumed, had a complete defense in the sense that they were operating according to what they believed to be authorization. The reaction that I had to this when I heard about it was one of surprise and disapproval. My initial reaction was to pull them back from their trip West, which I suggested to (White House Aide Egil Krogh be done immediately, and it was done, as far as I know. . . .

At that point in time, there were two what I suppose you would arguably call conflicting duties. To have imposed some kind of discipline, to have had them arrested, something of this kind, has been suggested as one of the alternatives. Obviously, the other alterna-

tive was to pursue this national security investigation as vigorously as we could and not compromise it if we could possibly avoid it. You get into these conflicting duty situations, as you know, senator, at times, and you have to take the main chance. You have to do the thing that is more important to the country and not do the other thing.

It occurred to me the other day that it's very much analogous to the dilemma of this committee, where you are confronted with the conflicting rights of individuals, who may be prejudiced by this whole process on the one hand, and what you conceive to be the larger national interest. And you have resolved that

conflict in favor of the larger national interest, even though some individuals may be harmed in the long pull by the process. And I can understand that.

At the same time, when you find yourself in the bite of that line, sometimes it's hard to explain from a hindsight standpoint your evaluation of what the more important thing to do was.

Inouye: What was the larger national interest?

Ehrlichman: The larger national interest, sir, was in finding out all we could about who and in what circumstances these vital national secrets, these top secret documents, were compromised.

Inouye: Did it also include the prosecution of Dr. Ellsberg?

Ehrlichman: No, that was really not what this was about. The Justice Department was well under way on that and they were handling that and they continued to handle it. This was a particular undertaking to try and find out how this happened, who did it, how it could be prevented in the future.

Inouye: . . . You have maintained throughout that in all of your service in the White House, especially in those activities evolving around the Watergate, you . . . that every act on your part was leg-

Ehrlichman: That is my belief, and I trust that is

true.

Inouye: If that is the case, why did former Attorney General of the United States cite your resignation as evidence of the President lowering his boom?

Ehrlichman: Well, I suppose that was a convenient landmark at that time and he undoubtedly is not aware of the President's considerations and motives at the time that I resigned.

Inouye: If you are clean, why did he fire you?

Ehrlichman: He didn't fire me, sir.

Inouye: Why didn't he insist that you stay on board?

Ehrlichman: Well, as a matter of fact, the proposal for me to resign came from me. It did not come from him . . . (White House Chief of Staff H. R.) Bob Halde- man and I talked. We felt that from our respective standpoints, that was simply not realistic. It was not viable. And it was we that proposed to the President that we make a clean break rather than the other way around.

Inouye: And you are maintaining that you had no knowledge of the cover-up and you further maintain that the mastermind of the cover-up was John Wesley Dean III?

Ehrlichman: I had no part in any cover-up. I am not

here to make charges against other people. As you say, this is not an accusatory forum. I think the evidence will speak for itself when it is all in, and then either you or the public or someone will be in a very good position to decide the answer to that second question . . .

Committee chairman Ervin, using what he called "a little of the Bible, a little of history and a little of the law," then questioned Ehrlichman about the powers of the President under the Constitution.

Ervin also debated "constitutional right" with John J. Wilson, Ehrlichman's attorney:

Ervin: . . . The concept embodied in the phrase every man's home is his castle represents the realization of one of the most ancient and universal hungers of the human heart. One of the prophets said, described the mountain of the Lord

as being a place where every man might dwell under his own vine and fig tree with none to make him afraid.

And then this morning, Sen Talmadge talked about one of the greatest statements ever made by any statesman, that was William Pitt the Elder, and before this country revolted against the king of England he said this:

"The poorest man in his cottage may bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, the rain may enter, but the king of England cannot enter. All his force dares not cross the threshold of the ruined tenements."

And yet we are told here today, and yesterday, that what the king of England can't do, the President of the United States can.

The greatest decision that the Supreme Court of the United States has ever handed down in my opinion is that of *ex parte Millikin*, which is reported in 4 Wallace 2, and the things I want to mention appear on Page 121 of that opinion.

In that case President Lincoln, or rather some of his supporters, raised a claim that since the Civil War was in progress that the military forces in Indiana had a right to try for treason a man they called Copperheads in those days, that were sympathetic towards the South, a civilian who had no connection with the military forces. So they set up a military commission and they tried this man, a civilian, in a military court, and sentenced him to death.

One of the greatest lawyers this nation ever produced, Jeremiah Black, brought the battle to the Supreme Court and he told in his argument, which is one of the greatest arguments of all time, how

the Constitution of the United States came into being. He said that the people who drafted and ratified that Constitution were determined that not one drop of the blood which had been shed throughout the ages to wrest power from arbitrary authority should not be lost. So they went through all of the great documents of the English law from Magna Carta on down, and whatever they found there they incorporat-

ed in the Constitution, to preserve the liberties of the people.

Now the argument was made by the government in that case that although the Constitution gave a civilian the right to trial in civilian courts, and the right to be indicted before a grand jury before he could be put on trial and then a right to be tried before a petit jury, the government argued, that the President had the inherent power to suspend those constitutional principles because of the great emergency which existed at that time, when the country was torn apart in the civil strife.

The Supreme Court of the United States rejected the argument that the President had any inherent power to ignore or suspend any of the guarantees of the Constitution, and Judge David Davis said, in effect, "The good and wise men who drafted and ratified the Constitution foresaw that troublous times would arise, when rulers and people would become restive under restraint and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutionality all times and under all circumstances unless established by irrevocable law."

Then he proceeded to say, "And for these reasons, these good and wise men drafted and ratified the Constitution as a law for rulers and people alike, at all times and under a circumstances."

Then he laid down this great statement, "No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

And notwithstanding that we have it argued here in this year of our Lord 1973 that the President of the United States has a right to suspend the Fourth Amendment and to have burglary committed just because he claims or somebody acting for him claims, that the records of a psychiatrist about the emotional or mental state of his patient, Ellsberg, had some relation

to national security.

Now, President Nixon himself defined the national security in one of his directives as including only two things: national defense, and relations with foreign countries. However, in the world opinions of a psychiatrist about the mental state or the emotional state or the psychological state of his patient, even if his patient was Ellsberg, could have any relation to national defense or relations to a foreign country is something which eluded the imagination of this country lawyer.

Now, I would like to ask you one question: Why, if the President has this much power, would he not have had the inherent power to have sent somebody out there with a pistol and had it pointed at the psychiatrist and said, "I am not going to commit burglary, I am just going to rob you of those records and give me the records," would he not have had that right under your theory?

Ehrlichman: Are you asking me, Mr. Chairman?

Ervin: Yes.

Ehrlichman: I think that is the same question Sen. Talmadge approached and undoubtedly in a situation such as I put, for instance, where you knew there was going to be an atomic attack tomorrow, undoubtedly a measure of that kind might be necessary.

Ervin: Was there—

Ehrlichman: Now, somewhere in between there is a line.

Ervin: Will you please—

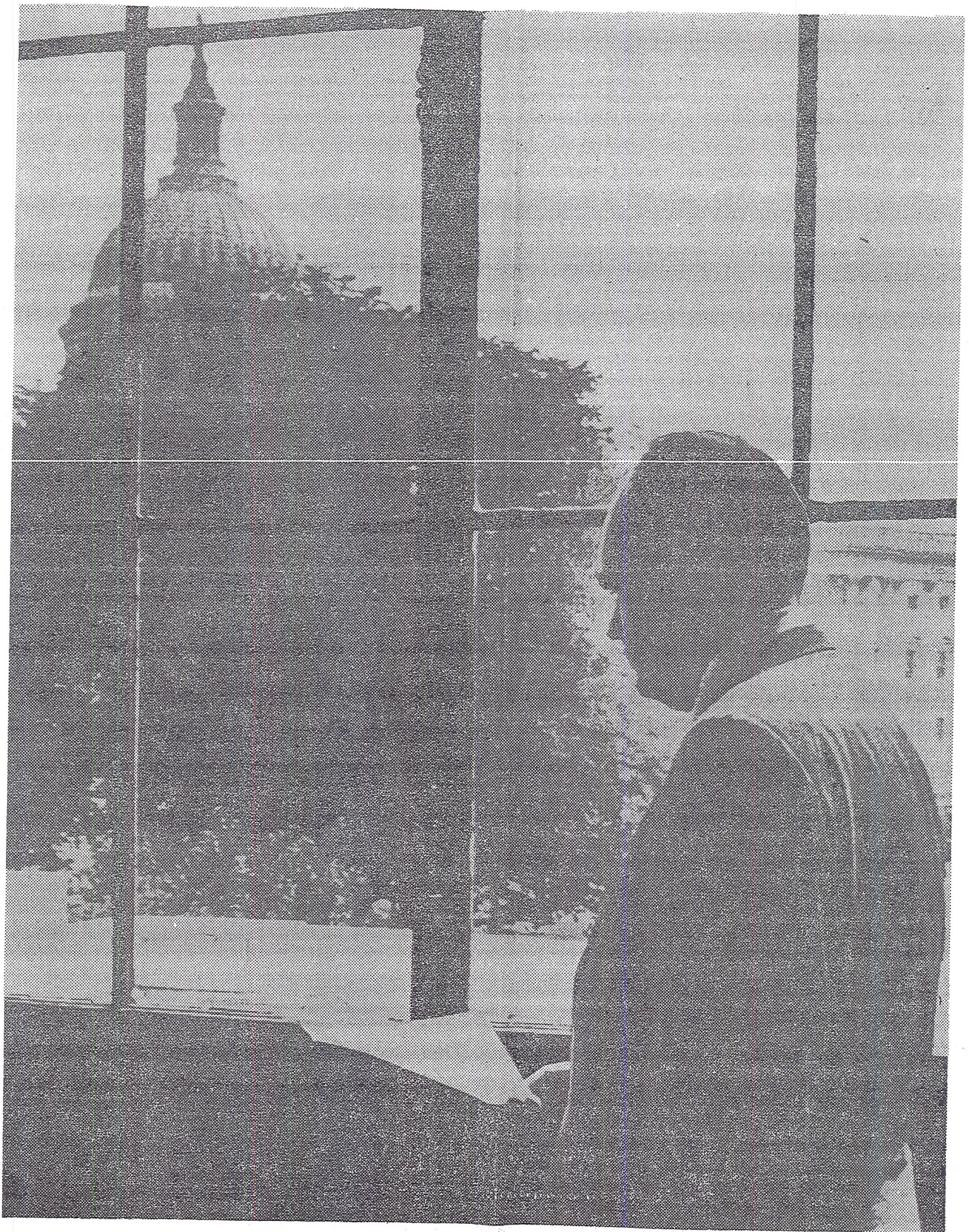
Ehrlichman: And the line

depends obviously, on a lot of things that you and I cannot settle here today.

I think the thing that your argument artfully chooses to avoid dealing with—

Ervin: I am not trying to avoid anything. I am trying to get this proposition to whether the President has power to suspend the Fourth Amendment to get on—

Ehrlichman: Mr. Chairman, you interrupted me. You have a delightful trial room practice of interrupt-



United Press International
During a break in the Watergate hearings, John Ehrlichman checks his notes. U.S. Capitol is in the background.

ing something you do not want to hear.

(Laughter)

I would like, if I could, to finish the sentence.

The connection, of course, between the psychiatrist's records and the psychiatric profile, and the determination of whether there was a spy ring or a foreign conspiracy which had taken these top secret documents and delivered them to a foreign power, it seems to me, is an unbroken chain of circumstances that explains itself.

Now, I recognize for the purpose of your rhetorical approach to the problem that it is fun to say how could a man's emotional state be equated with national security? But in fact, there is a direct linkage step-by-step in this which I think we have to lay on the table and look at.

Now, this business of going and pointing a gun at somebody, I can conceive of a set of circumstances, a different kind of national security situation, such as this impending attack or something of that kind hypothetically where such a measure might very well be the very thing that the President might determine was necessary, and you will recall that the Congress, in recognizing this power, said, "Such means as the President shall determine." And that I think, as Mr. Wilson pointed out this morning, was endorsed by the committee of which you are the chairman, sir.

Ervin: Well that is not what that bill said. It said that the President could exercise his constitutional powers when he determined, according to his determination. It didn't say he had any constitutional powers such as you state because Mr. Wilson and myself both agreed that the court in this case, the thing it held principally, was that you couldn't exercise electronic surveillance without a warrant complying with the Fourth Amendment for the purpose of gathering intelligence about domestic subversion, and we also agreed that the decision itself flatly held that the statute had nothing whatever to do with the question of national security.

Wilson: Mr. Chairman, can I get into this?

Ervin: Yes, sir.

Wilson: I think this morning you referred to the Judge Field case, which is strictly known as Cunningham against Nagle, isn't it? Do you remember that case?

Ervin: Yes, I remember the case. That held that you could—a federal marshal wouldn't be guilty of murder for shooting a man that was trying to kill a federal judge.

Wilson: What was the statute based upon but the constitutional right?

Ervin: I don't know. I don't recall, it has been a long time since I have read

it.

Wilson: Shall I prepare—
Ervin: It wasn't based on Section 2111 of Title 18 of the United States Code.

Wilson: No, but it was murder though, it was homicide.

Ervin: Yes.

Wilson: Justifiable homicide in a statute which was supported by constitutional theory.

Ervin: And also justified, it happened in California and it was justified, by the principle of the common law that one person can kill another to prevent the consummation of a felony.

Wilson: Is this something that happened in California and no place else in the country?

Ervin: In a law in any state which had a common law system.

Wilson: We have that everywhere in the country except California and Louisiana.

Ervin: I am unfortunate going to have to obey the 5-minute notice about a vote, but I have no quarrel with the Nagle case but I do think the Nagle case merely applied the rule that one had a right to kill another to prevent a wrong-doer from committing a murder.

Wilson: All I say is there is a murder case that was justified.

Ervin: I regret I have to go and vote and I would love to prolong this debate with you.

Wilson: I would, too.

Ervin: I think maybe because of the lateness of the hour that we had just better recess until in the morning at 10:00 o'clock.