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Watergate Case Viewed as Peril To Concert of National Security

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WASHINGTON, May 15—By invoking "national security" as an integral part of the Watergate affair, President Nixon has set in motion a series of political, constitutional and legal debates and maneuvers that may continue long after the immediate issues of Watergate are resolved.

By using national security to justify actions that critics have charged constituted a cover-up of the Watergate break-in and the activities of the so-called plumbers investigating unit, many legislators and officials believe, the President has undermined serious discussion of security against foreign threats

The reaction to this use of national security has also forced to the surface two key constitutional issues: Who has the right to determine what national security is and, if this right is lodged in the White House, to what extent does it give the President the authority to encroach on Fourth Amendment guarantees against unreasonable search and seizure.

Impact on Trials

Of immediate importance will be the impact of Mr. Nixon's statements on national security in the recently published White House transcripts on the pending trials of his former aides.

A central issue in these trials is expected to be whether or not the defendants believed the President had the right to order violations of the law in the name of national ecurity.

The concept of national security has come to embrace the related but distinguishable area of foreign policy, defense and internal security against domestic threats.

Most of these national security issues were raised several weeks ago in the chamber of Federal District Judge Gerhard A. Gesell. Speaking to the attorneys for two former Presidential aides, John D. Ehrlichman and Charles W. Colson, Judge Gesell said that before the trial could proceed he would have "to try to nail down clearly in one form or another the question of whether or not the President had exercised his authority—if he has it, and in my assumption at this point he does—in the field of foreign affairs, to direct an investigation in disregard of the Fourth Amendment."

Civil Rights Charge

The charge in this case is that those in the plumbers investigating group or responsible for it violated the civil rights of Dr. Daniel Ellsberg's former psychiatrist when they broke into his office looking for files on Dr. Ellsberg.

In addition to Mr. Ehrlichman and Mr. Colson, four other men were indicted in the Sept. 3, 1971, break-in in Beverly Hills, Calif.

Dr. Ellsberg, a former Defense Department aide, has said that he provided the press with the Pentagon papers — top-secret Government material about United States involvement in South Vietnam.

The New York Times reported yesterday that highly reliable sources said Mr. Nixon had sent a letter to Judge Gesell asserting that the plumbers had operated under a general delegation of his Presidential authority while investigating Dr. Ellsberg. In his letter, however, the sources said, the President again asserted that he had not specifcally authorized the break-in.

President Nixon seems to have realized that he was walking into a political and legal mine field long before others did.

In the transcript of an April 27, 1973, meeting in the Oval Office, the President and Henry E. Petersen, Assistant Attorney General, briefly allude to a conversation they had had soon after members of the plumbers group were arrested in the Watergate break-in.

P. You remember my call from Camp David. I said, 'Don't go into the national security stuff.' I didn't mean

HP, Oh, I understand.

P. 'Cause I remember I think we discussed that silly damned thing. I had heard about. You told me that. That's it, you told me.

P. What (expletive removed) did they break into a psychiatrist's office for? I couldn't believe it.

There were others in Washington who could not believe it either. Daniel I. Davidson, a Washington lawyer, who is a former aide to Henry A. Kissinger, said recently that "by a wild stretch of the imagination, one might say the break-in of Ellsberg's psychiatrist's office was legitimate, but by no stretch of the imagination is covering it up on national security grounds legitimate."

Senators Discern Peril

A number of Senators, interviewed here, said in effect that the umbrella of national security had been stretched to the point of damaging real security. Senator Edward M. Kennedy, Democrat of Massachusetts, said that "it is hard to get people to take real national security issues seriously when that term is used to cover a host of matters that aren't remotely related." He added, "It cheapens the whole idea."

Senator Charles H. Percy, Republican of Illinois, said that "the very use of the term now evokes cynicism and distrust, which is dangerous, because

our real national security needs are as valid as ever.

Senator Henry M. Jackson, Democrat of Washington, likened the situation to the boy who cries wolf too many times "only to lose credibility when legitimate grounds for action exist."

The conservative journal, Aviation Week and Space Technology, recently said in an editorial that Mr. Nixon's "false security blanket" had managed to "conceal policies that were either illegal, corrupt, or so patently wrong they could not stand the pressure of public debate."

Some in Washington have come to see Presidential invoking of national security, first about the Vietnam war and the over Watergate, as a means to silence domestic opposition.

This, in turn, has led to what Secretary of State Kissinger calls a constant and dangerous questioning of motives. Thus, as one Pentagon official remarked, "When we talk about the growing Soviet missile, threat, people think we're making it up to destroy the arguments of the American doves."

What someone has labeled the "verbicide" of the national security concept began as an issue of political give-and-take in Washington, but since Water gate it has been transformed into a constitutional issue as well.

The issue goes back to what the Constitution says about the powers of the President in foreign affairs. Experts agree that it says very little about this subject, and to the extent foreign affairs is mentioned, the executive and the legislature share authority.

William G. Miller, chief of staff of the Special Senate Committee on National Emergencies, said in a recent interview that "there are no statutory powers of which we are aware which give the President the authority unilaterally to determine what national security is."

'Inherent Powers'

But over the years, Presidents asserted their "inherent powers" in the fields of defense and foreign affairs. At the same time, Presidents used their growig authority in these fields to justify interna security measures such as wiretapping and breaking and entering without rourt warrants. With some notable exceptions, Congress and the Supreme Court went along.

In this way, Presidential powers in the separate dields of foreign affairs, defense and internal security were fused into the new concept of ational eecurity. Whatever the Constitution stated, wide Presidential authority in national security became a generally held assumption.

The assumption was so firmly held in the Nixon Administration that Tom Charles Huston, the author of the Nixon domestic intelligence plan disclosed during the Senate Watergate hearings, conceded in an interview that neither "I nor anyone else in the Administration to my knowledge etudied the legal issues" of the plan or the plumbers operation. The plumbers unit was so-named because it was set up by the White House to stop leaks of security information.

Because of growing opposition to the Vietnam war, Congress moved to curtail Presidential powers to act unilaterally in defense and foreign affairs. By the National Commitments Resolution of 1969 and the War Powers Act of 1973, the President was urged, then required to seek affirmative Congressional action before making commitments and going to war.

Congress also moved to restrict Presidential authority ir internal security matters. Pending is a bill called the Bill of Rights Procedures Act of 1974 that would bar any form of search and seizure for any reason, including national security, without a court warrant on the probable cause of a crime.

In the meantime, executive branch officials continued to make claims about Presidential authority in internal security in the name of national security. Asked during the Senate Watergate hearings whether the President could order murders in the name of national security, Mr. Ehrlichman answered, "I do not know where the line is."

Federal courts, according to some Washington lawyers, have not been clear and consistent in drawing lines in this area either. The ambiguities may be resolved to some extent in the pending trial of Mr. Ehrlichman, Mr. Colson and others.

Washington lawyers who did not want to be identified maintained that the Government would find it difficult to convict the former Presidential aides. These lawyers said that the Government would have to disabuse Judge Gesell in pretrial proceedings of his assumption that the President can order break-ins and burglaries without warrants in the name of national security.

A Problem of Motives

If the case does go to trial, the prosecutors will have to convince the jury that the defendants did not believe the President had the authority to order the break-in and that they had an intent to deprive Dr. Ellsberg's former psychiatrist of his civil rights. Given prevailing assumptions about Presidential power in this sphere and the monumental task of proving motives, the defense is in a strong position, several lawyers have argued.

But these lawyers also pointed out that the defendants had two factors working against them.

One is the statement by Egil Krogh, Jr. one of the leaders of the plumbers group, at the time of his sentencing after pleading guilty to a charge of violating the civil rights of Dr. Ellsberg's former psychiatrist. Mr. Krogh said:

"I see now that the key is the effect that the term "national security' had on my judgment. The very words served to block critical analysis." He added that he came to releaze that the "ultimate national security objective" was nothing more than the "freedom of the president to pursue his planned course."

The second fact is the White House transcripts themselves. The transcripts seem to show that the President was well aware of his dilemma, whether to invoke national security to protect his aides and himself even if thet meant stretching the meaning of security or to leave his aides out on a limb and risk exposing himself and his foreign policies.

In the end, the courts and Congress will have to determine whether in that March 21, 1973, conversation among the President, John W. Dean 3d, then his counsel, and Mr. Ehrlichman the idea of national security was invented as a cover-up or simply recalled as fact. They will also have to decide whether the acts committed in he name of national security were in any sense reasonable.