

By Ervin  
And Lawyer

Washington

The testimony of John D. Ehrlichman before the Senate's Watergate committee was delayed for nearly an hour yesterday while the committee chairman and Ehrlichman's lawyer debated whether a President has the inherent power to break the law to defend the nation against a threat to its security.

That thorny and complex question, which has never been entirely decided by the courts, remained unresolved after yesterday morning's learned and lively exchange between the lawyer, John J. Wilson, and Senator Sam J. Ervin Jr., a former justice of the North Carolina supreme court.

The debate was invited by Ervin Tuesday, after he and Wilson clashed over the legality of a burglary, directed by White House aides, of the office of a psychiatrist who had treated Daniel Ellsberg.

The burglars were participating at the time in a "covert operation," approved by Ehrlichman, then chief domestic presidential adviser, to obtain a psychiatric history of Ellsberg, who has admitted making the Pentagon Papers available to the press.

Wilson appeared before the committee well fortified with texts and documents.

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UPI Telephoto

JOHN J. WILSON  
Ehrlichman's attorney

He thumbed through them frequently for material to support his point that neither Congress nor the Supreme Court had ever contravened the presidential authority, implicit in the language of the Constitution, to authorize actions—illegal under other circumstances—if they were necessary to protect the country from foreign subversion.

It was "not a silly proposition," he told the senators, that the September, 1971, burglary, although done without a warrant in violation of California law, was nevertheless justified by the breach of national security that the White House then believed Ellsberg's actions

Back Page Col. 1

# BIG DEBATE

From Page 1

represented.

Ervin, who like Wilson is in his seventies, retorted that Ellsberg was under prosecution for stealing the top-secret Defense Department study of the Vietnam war from the government, not for passing it to a foreign power. He added that Dr. Lewis I. Fielding, the psychiatrist, "was not engaged in any foreign intelligence activities" either.

The burglars, Ervin asserted, had simply "decided they ought to go and try to steal some documents from the doctor of a man who was being prosecuted for stealing from the government, which is quite a peculiar situation, really."

Though fascinating for the agility with which both Wilson and Ervin threaded their way through the sharp twists and turns of the Constitution, the debate was over what really amounted to a moot point.

## 'PLUMBERS'

Ehrlichman has testified that neither he nor President Nixon expressly authorized the burglary attempt, which was carried out by two members of the White House "plumbers" squad that Ehrlichman directed in late 1971. The two men, G. Gordon Liddy and E. Howard Hunt Jr., were subsequently convicted in the Watergate wiretapping case.

In his statement of May 22, Mr. Nixon said he would not have approved the break-in if he had been told of it in advance, and Ehrlichman said yesterday that he had not intended that illegal means be used to carry out the "covert" operation.

Nevertheless, Wilson contended, presidential approval for the action would not have abrogated the constitutional guarantee of security from unreasonable search and seizure, which the Fourth Amendment defines as any conducted in the absence of a judicial warrant issued from a showing of "probable cause."

## POWER

Even the Congress, he maintained, has recognized that the president might hold the power to order otherwise unconstitutional invasions of privacy when it wrote and passed the omnibus Crime Control and Safe Streets Act of 1968.

Then he read to Ervin, who as a member of the Senate Judiciary Committee had helped to draft it, a portion of the law that he called a "symbol" of such recognition.

In paragraph three of section 2511, title 18, of the United States Code, Wilson said, the Congress had been careful to note in placing strictures on the use of bugging or wiretapping equipment, that it did not intend to abridge the "constitutional power of the president to take such measures as he deems necessary" to protect the nation against hostile attack, to obtain "essential" foreign intelligence information, "or to protect national security information against foreign intelligence activities."

## REPLY

Ervin conceded that he recalled the paragraph, and with eyes twinkling and brows dancing, he replied: "they put that in there because there was a controver-





AP Wirephoto

COMMITTEE CHAIRMAN SAM ERVIN QUESTIONED JOHN EHRLICHMAN  
The senator held a copy of the U.S. Constitution that he used for reference

sy between some members of the committee having an opinion that the president almost has powers that would make an eastern potentate turn green with envy."

Wilson, who proved to be one of the hearings' few participants capable of counterpunching against Ervin's fast verbal jabs without falling back, noted that 20 years ago he had argued the exact opposite of the position he was now taking while a lawyer for Youngstown Sheet and Tube Co. in the so-called steel seizure case.

In that case, which Wilson's client won before the Supreme Court, it was held that President Truman did not have the authority under his national security powers to take over strike-threatened steel mills whose output was needed for the Korean war effort.

In characteristic fashion, Ervin leaped through the hole that Wilson had opened.

"If the President would have no inherent power to seize steel mills in time of war to carry on the war," he drawled, "he has no inherent power to steal a document from a psychiatrist's office in time of peace."

At that point, Senator Howard H. Baker Jr., of Tenn., the committee's ranking Republican member, orally parted the two men.

"I would like to suggest one or two more points," Baker began, then delivered a 10-minute discourse in which he concluded that any resolution of the argument would have to depend on whether there had been, "probable cause" to believe that Ellsberg's psychiatric records, the object of the burglary, were needed to

ward off a threat to the country's security.

But Wilson would not be vanquished.

#### DECISION

He called Baker's attention to a decision last year in which the Supreme Court, while holding that government wiretaps of suspected domestic subversives violated the Fourth Amendment unless ordered by a court, was careful to note that it was leaving undecided the President's power to act against threats of foreign subversion.

"It is difficult sometimes to find the line between domestic security and foreign security, Wilson said in paraphrasing the court, and then noted previous testimony by Ehrlichman "that the Russians either had or were getting" the informa-

tion contained in the Pentagon Papers.

Ehrlichman also implied yesterday, as he did Tuesday, that the government suspected Ellsberg of having been the sources of a shipment of the Pentagon Papers that mysteriously arrived at the Soviet Embassy in Washington in June of 1971.

"We did not know whether we were dealing here with a spy ring or just an individual kook," Ehrlichman recalled, adding that he had believed that the confidential information on Ellsberg's psychiatric condition was necessary to "to determine how so many vital top-secret documents could get out of the federal government and into the hands of a foreign power."

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