Ervin, Wilson: Collo

... on Constitution ...

Following are excerpts from yesterday's Senate select Watergate hearing testimony, beginning with a colloquy between John J. Wilson, attorney for yesterday's witness, former top Presidential aide John D. Ehrlichman, and the Senate committee's chairman, Sam J. Ervin Jr. (D-N.C.), on whether or not the burglary of the office of Daniel Ellsburg's psychiatrist by White House agents was a legal extension of the President's powers to protect national security.

Ervin: I understand that Mr. Wilson wishes to address the Committee on the legal question I was discussing with Mr. Ehrlichman and Mr. Wilson yesterday, and without objection on the part of any member of the Committee, I will extend to him an opportunity to do so at this time.

Wilson: Thank you, Mr. Chairman . . .

Now, the state of the law today is that the point which I am arguing has not yet been passed upon by any court that I know of, but the Supreme Court has left the question wide open, if you please . . .

But there is a Senate report, 1096, I think it is, on the Safe Streets Bill of 1968 of which 2511 is a portion and, of course ,as far as the Chairman is concerned, I know that this is old hat to him, but there is in the report a section on national security which recognizes a reservoir of power in the President of the United States with respect to foreign intelligence, foreign leaks, this sort of thing . . .

Now . . . 21 years ago I was in the steel seizure case . . . In that case I fought vigorously against the inherent power of President Truman to seize the (steel Mills) . . . and the Supreme Court, as you know, sustained our contention, that there was not a package of inherent powers in President Truman to make that seizure.

Now, this case is unlike that case because there is a reservoir of constitutional power recognized at least hypothetically by the (Safe Streets) bill which was passed. . .

Both Sen. McClellan who, I believe, was the chairman of the Judiciary Committee, and Sen. Hart, were quoted in their debates on the floor, and they make it plain that Section 2511 was not intended to restrict or extend the power of the President. It was simply a reserving clause with respect to whatever power he had.

Now . . . my reading of the Supreme Court's decision in the Plamondon case is that in a domestic security case, and that was that case . . . that Plamondon bombed the CIA headquarters in Chicago, it was treated by the Supreme Court time and time again as a domestic security case, . . . that the Supreme Court said "We are not passing upon the power of the President with regard to foreign intelligence."

. . . coming directly to how I read the Plamondon case, and it is extremely interesting that I don't remember ever reading before that the Supreme Court would call upon the oath of the President in the Second Article of the Constitution, the fourth clause, as a source of power. As you know, it says to preserve, protect and defend the Constitution of the United States, and I have not found, perhaps the Chairman is way ahead of me on this, I have not found any case where a source of Presidential power has been drawn from the language of the oath.

But whether it has before or whether it has not, the imprimatur of the Supreme Court through Justice (Lewis) Powell has not been put upon the language of the oath as a source of power, and it is a source of power, as the Court says, and I will read the beginning of this paragraph, "We begin the inquiry by noting that the President of the United States has the fundamental duty under Article II Section I of the Constitution 'to preserve, protect and defend the Constitution of the United States.' Implicit in that duy is the power to protect our government against those who would subvert or overthrow it by unlawful means." And it goes on to say in the exercise of that power the Attorney General may be authorized to authorize permissions to tap wires.

Now mind you this case ends up with the result that because the tapping in this case, with the approval of the Attorney General, and on the basis, let's say, of the philosophy of 2511 (of the Safe Streets Act), the Supreme Court said that because it involved domestic security it did not abrogate, supersede or otherwise lay aside the Fourth Amendment. But the question is wide open, if you please, as to whether, in the case of foreign intelligence, the cloak of the Fourth Amendment wraps itself around the President and requires prior judicial action.

Now, 2511 has had the effect of saying that in certain instances mentioned therein the President will not violate the wiretapping law by proceeding to tap for purposes stated in there. It goes on to say that the taps which are obtained are admissible in evidence and are not subject to the—I am adding this—are not subject to judicial attack . . .

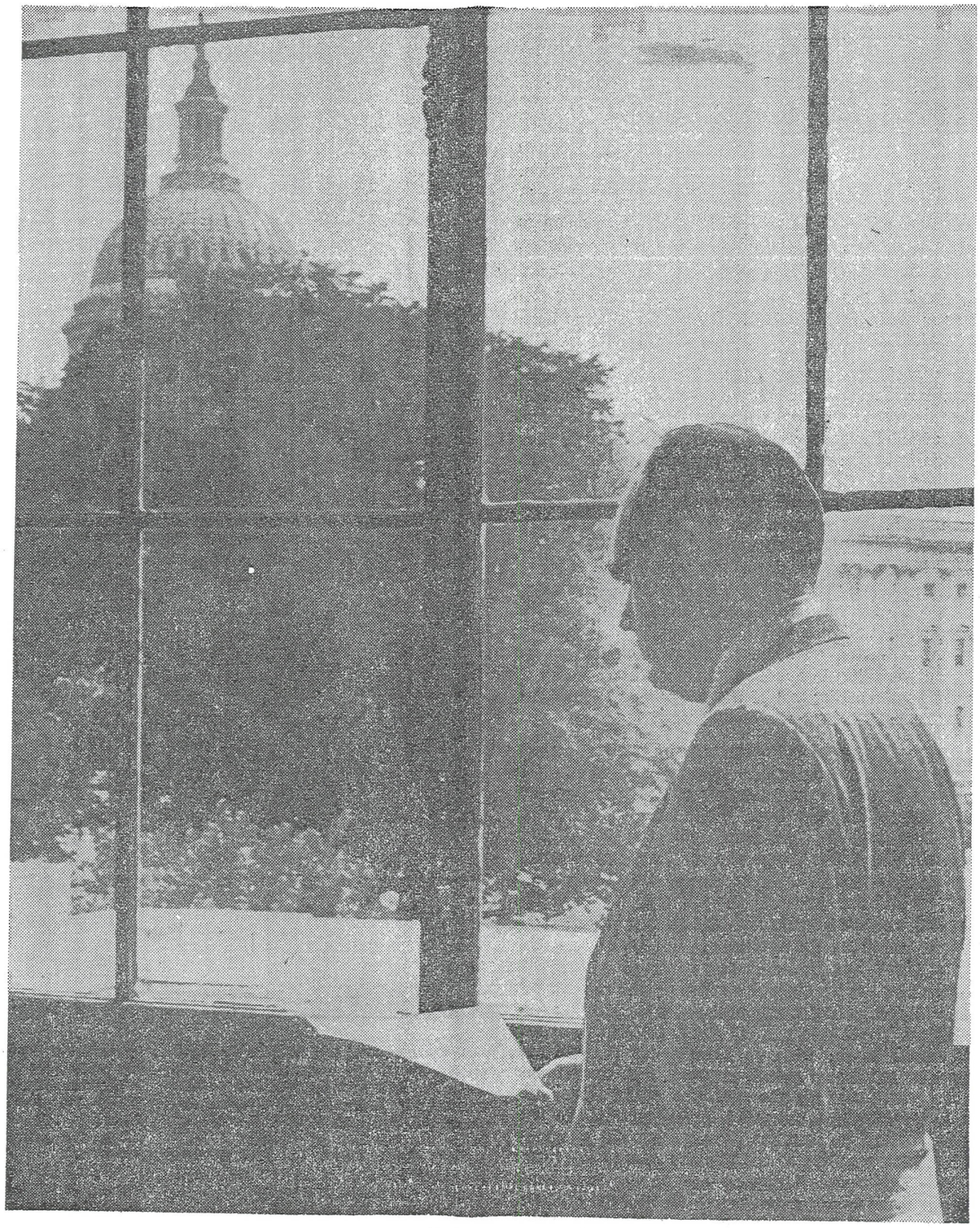
Now, nobody can dispute me on one point, and I am sticking my neck way out, that the Supreme Court reserved the question of the use of the reservoir of, a possible reservoir, let me put it that way, of Constitutional power reposed in the President to violate the law in respect of foreign intelligence, foreign espionage, foreign collaboration. That is in here. I can turn a half dozen times to Justice Powell's position in making it clear that he was not deciding that question.

Now, my position is that if there is this reservoir of power, and your own (the Senate Judiciary) committee, sir, in reporting out the Safe Streets Act bill in 1968 was willing to give an indication that there existed a reservoir of power for the purpose of, what I say, and this is my language, for the purpose of permitting the President to otherwise—to do what would other wise be a crime, to protect the nation against foreign intelligence and for the purpose of obtaining foreign intelligence.

Now, I know I am open to the attack, well, can he shoot somebody on the street, I am not going that far, and that is driving myself to a conclusion ad absurdum. As you know, as you all know, wiretapping is a form of invasion of the premises of the person who is overheard . . .

So that we have squarely —we are not driving this problem any further today than saying that it is not a silly proposition. Mr. Chairman, you didn't call it silly, you maybe feel it was but you didn't say it—it is not a silly proposition for use to contend that an entry into the psychiatrist's office under grounds which would technically (be under state law) burglary, because there is no federal crime in that respect, is no different from an entry through his telephone system, and if your committee—and by your committee, I am not speaking of this august body, I am speaking of another august body, that is the Judiciary Committee, and I don't find that you, sir, or anyone else dissented from the philosophy of the report of the Senate which went out on the floor in support of that bill, that there is very likely a reservoir of constitutional power unlike the steel case, in the President in the matter of national security . . .

There is no one living . . . who can assert with categor-



United Press International

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

was a potential danger, and I advised both people at the meeting, Mr. Dean and Mr. Colson, of a previous conversation that I had had with the President on that subject, and it indicated to them . . . that the President wanted no one in the White House to get into this whole area of clemency with anybody involved in this case, and surely not make any assurances to anyone.

Mr. Colson said that he was sure that he could avoid that pitfall and have the conversation. He was advised by Mr. Dean to either take notes or make such mental notes of the conversation that he could reconstruct the conversation if the question ever came up again. And that is what Mr. Colson did. We had a subsequent meeting where

Gurney: Before we go to the subsequent meeting, could you be a little more explicit in your testimony as to how the discussion arose about executive clemency, who brought it up, and who said what on this subject at the Jan. 3 meeting?

Ehrlichman: I can't say who brought it up, senator. We were going over the potential problems that could come from Mr. Colson having a contact, either with Mr. Hunt or his attorney. It had been his firm practice not to have any contact with Mr. Hunt because of the imputation, because frankly, everybody knew they were close . . . There had been a lot of suspicion that somehow, Mr. Colson might be implicated in the Watergate because he was a close friend of Mr. Hunt's, and Mr. Colson was leaning over backwards to do everything he could to avoid giving any credence or credibility to that suspicion.

So when we got into the decision that he would have contact with Bittman rather than Hunt, I think it was John Dean who said, you are going to be asked whether you are willing to get Hunt out at some time in the future.

Gurney: How did Dean know that he was going to be asked that?

Ehrlichman: Well, it was conjecture . . .

Gurney: All right, now, you have a meeting on Jan. 4, the next day. Did that involve this subject at all?

Ehrlichman: No. . . ,.

Gurney: I see you had a meeting, too, on that day Jan. 4th, with the President. Did you discuss Watergate in any fashion on that meeting?

Ehrlichman: I do not recall, senator . . . I believe that was a catch-up session on just the problems that had accumulated during my long absence, but I just do not have any recollection of specific topics . . .

Gurney: Let us turn to Jan. 5, now, a meeting with Dean and Colson ... Does this involve Hunt and clemency again?

Ehrlichman: I do not know, senator, whether that is the meeting where Mr. Colson reported on his meeting with Mr. Bittman or whether it was on the 25th of that month. There were two meetings with both Dean and Colson. My recollection is that at some point in time, rather soon after, he had met Bittman, Colson and John Dean and I sat down again. Colson recounted to us what the conversation had been .... He gave us the strongest kinds of assurances that he had not made any sort of commitments, that he felt that Mr. Bittman had very guardedly and, if you will pardon the expression, covertly advanced feelers to him which he rebuffed.

Gurney: ... Mr. Dean testified before this committee and was very positive in his testimony that as a result of this meeting that occurred on Jan. 3. Ehrlichman checked with Nixon and told Colson to give Bittman assurance clemency would be offered ... Would you comment on that?

Ehrlichman: Yes, sir. That is a story that had an out-of-town try-out like many of Mr. Dean's episodes ...

Gurney: You never took up this matter with President Nixon at any time?

Ehrlichman: I did not have to ...

Gurney: To put it bluntly, your testimony is that John Dean told an untruth?

Ehrlichman: Yes, sir ...

Gurney: ... Did Colson ever talk to you about any conversations he ever had with the President about executive clemency?

Ehrlichman: No, sir, he did not.

Gurney: Did you ever ask him whether he ever had any conversations with the President?

Ehrlichman. No ... No. When Dean and Colson and I talked about this, I went through the substance of my July conversation with the President, and one of the things that I mentioned was, 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 alternative 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 did no wrong ... that every act on your part was legal, proper, and ethical?

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 Haldeman 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 threshhold 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 incorporated 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 constituion- all times and under all cirperil unless established by irrepealable 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 al 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 committee 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 interrupting 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 he 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 unfortunately 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.

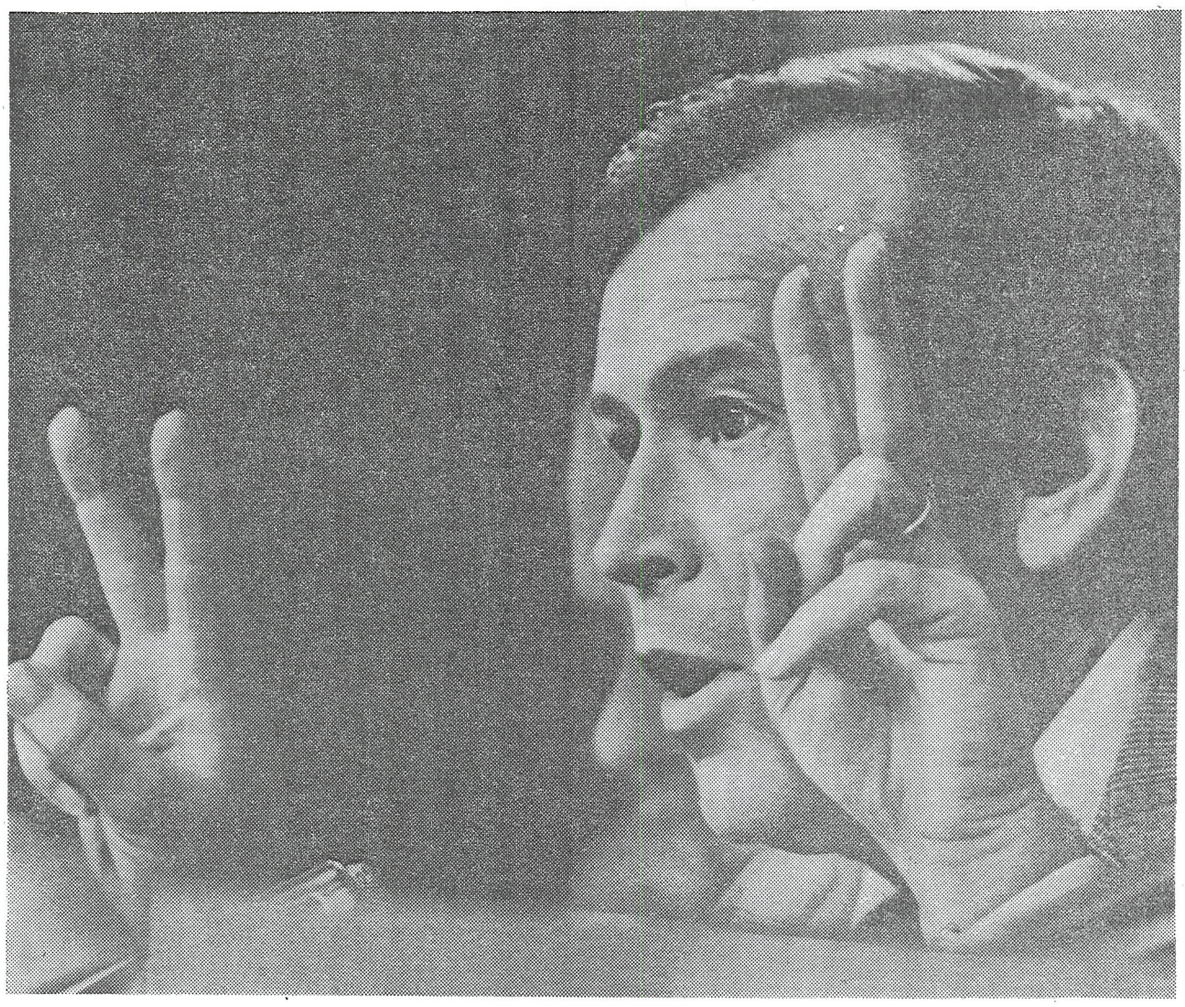
Ervin: I regret I have to go and vote and I would love to prolong this debate with you.

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.

Photos by Frank Johnston—The Washington Post

John Ehrlichman, former adviser on domestic affairs to President Nixon, ponders, makes a point and listens during the Senate hearing.



Associated Press

Waggling his fingers to put quotation marks around the term, Sen. Howard Baker talks about "presidential power."

ical certainty that the President of the United States does not have the Constitutional power to cause the entry under what would be otherwise illegal circumstances in pursuit of foreign intelligence, and I say again without fear of contradiction, that we are entitled to consider when we get to that point, that the Fourth Amendment may have vanished from the scene.

Ervin: Well, Mr. Wilson, I have enjoyed your argument . . .

I agree with your interpretation of the (Plamondon) case . . . In this case, the Government was taking a position which was long maintained by former Attorney General Mitchell, that the President had inherent power to exercise surveillance without a warrant from any court in respect to protecting against domestic subversion. And, of course, in the case you referred to, the Government took the position that Section 2511.3 (of the Safe Streets Act) argued that except in national security surveillance, this warrant requirement, the Congress recognizes the President's authority to conduct such surveillances without prior judicial approval.

Justice Powell said Section 2511.3 can find no power as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such powers as the President may have under the Constitution . . . we therefore find the conclusion unacceptable that Congress intended to make clear that the Act simply did not legislate with respect to domestic security surveillances.

I served on the Judiciary Committee when Section 2511 . . . was drawn, and of course, if we had not put this in there, the same thing would have resulted, because Congress could not take away any constitutional powers of the President. So they put that in there because there was a controversy 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, and some people, like myself, on the Committee felt that the Constitution limits and defines the powers of the President.

Some people believe in a doctrine of inherent powers. I do not believe the President has any power at all except such as the Constitution expressly gives him or such as are necessarily inferred from the expression of those powers. I think the Constitution was written that way to keep the President and, of course, the Congress, from exercising tyrannical power . . .

Where you and I part company is on the facts.

I think we have a rather anomalous situation here. Here was the government — they were not prosecuting (Daniel) Ellsberg through the agents of the Department of Justice for giving papers to Russia. They were just merely charging him with stealing some papers. . .

And here were some employees of the White House that go out and for some strange reason, I guess, trying to further — they did not trust the Justice Department to do the prosecuting all by itself. So they 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.

Now, I cannot see the slightest relationship between Dr. Fielding's, I believe his name was, notions of the mental state of Daniel Ellsberg and foreign intelligence activities. The only activity I think the doctor was engaged in was trying to determine what the mental state of his patient was. He was not engaged in any foreign intelligence activities, and I think —this is my interpretation of the Constitution — I think that the emissaries that were sent out there for the plumbers to try to steal the doctor's notes were domestic subversion and not in defense of this country against foreign intelligence activities.

Now, I think your steel case, which I think is one of the remarkable cases, they

held in that case, and I am sure largely on the basis of a very persuasive argument that you made, that the President, even though the U.S. was engaged in war in Korea and needed steel in order that the men fighting that war might have weapons and munitions.

And even though industrial disputes were about to close down the source of that steel, namely, the steel plants, they held that the President of the U.S. did not have any inherent power under the Constitution to seize steel mills for the purpose of securing a flow of munitions and weapons to American soldiers locked in battle with a foreign force. And I think that is pretty persuasive authority, if that is so.

If the President does not have any inherent power under the Constitution to seize steel mills in order that he might carry on a war and furnish the weapons and munitions that will enable the soldiers to fight and prevent destruction of themselves at the hands of the enemy, I think that is authority that if the President would have no inherent power to seize steel mills in time of war to carry on the war, he has no inherent power to steal a document from a psychiatrist's office in time of peace . . .

Wilson: May I reply?

In . . . the Plamondon case, Justice Powell puts a footnote that it is difficult sometimes to find the line between domestic security and foreign security. National security is a broad word. It is a misleading word in itself, because national security might envelop both . . . I think if you will go back to my symbol, 2511, you will see that the Chairman's Committee on the Judiciary reposed in the President his own absolute discretion by use of the words "He deems necessary to protect the nation."

So that I am arguing that when it comes to the exercise of this reservoir of power in a foreign intelligence case, and I want to come to the facts for a moment on that quick, that in that case, it is the President's discretion which is to be guided.

Now, there is testimony here by Mr. Ehrlichman that the Russians either had or were getting this information. Now, this isolation that the Chairman puts Mr. Ellsberg and his psychiatrist in is, I submit—I am looking for a general adjective, Mr. Chairman. I would say that it is unfair for you to do that, if you will forgive the briskness of that observation.

The genesis of this was either the fact that the papers that were passed to the Russians or that there was reasonable ground to . . . believe that they were going to the Russians. Now, this puts a cap of foreign intelligence, not even an umbrella, a complete cloak upon this whole transaction?

Following up on this discussion, Sen. Herman Talmadge (D-Ga.) questioned Ehrlichman further about the Ellsberg psychiatrist burglary and the question of national security:

Talmadge: Now, in matters involving national security, could the President authorize a forgery?

Ehrlichman: Well, again, you are getting me into an area that obviously is a subject for the experts . . .

Talmadge: You do not think he could authorize murder, do you?

Ehrlichman: I do not — as I say, I do not think I am the one to try to respond to that kind of question as to where the line is.

Talmadge: Well, you authorized the break-in, did you not? I was, I was trying to—

Ehrlichman: No, sir, I did not.

Talmadge: You affirmed it yesterday in a memorandum that I saw . . .

Ehrlichman: No sir, I submit that that is not what that memorandum says. . .

What that memorandum says is that the investigation which had previously been authorized by me should also include an attempt to ascertain the contents of these files. There is nothing in there about the means to be pursued, and my testimony was, and continues to be, that my assumption was that that could be done by completely conventional investigatory means.

Talmadge: I will read the language: "Covert operation to be undertaken to examine all of the medical files still held by Ellsberg's psychiatrist"

How do you think you could examine all the medical files without a break-in?

Ehrlichman: Well, it has occurred to me since because I have been asked this question before, that one way that it could be done is through false pretenses, through or through perfectly honest—

(Laughter)

—perfectly honest means, one doctor to another, by recruiting the assistance of another psychiatrist or of a doctor or of a—someone who could get at them that way . . .

I am not a trained investigator, Senator, and what I know from my own experience is that people who are investigators, as I mentioned yesterday, insurance adjusters, people of that kind have over the years brought to attorneys information of this kind which they have been given the assignment of gaining. It simply was not in contemplation that a break-in, as such would be engaged in . . .

Talmadge: What relationship did Dr. Fielding (Ellsberg's psychiatrist) have with national security?

Ehrlichman: Well, the CIA perfected a technique, as I understand it and again I am not your best witness on this, in which they can find out a lot about a foreign agent, a foreign official, someone who is the object of their investigation through the device of what they call a psychiatric profile. Two people in this special unit, Mr. (David) Young and Mr. (E. Howard) Hunt had both had experience with the use of these profiles in the past, and they felt strongly that in this case, where there were so many unknowns, we did not know whether we were dealing here with a spy ring or just an individual kook or whether we were dealing with a serious penetration of the nation's military profile of this kind might, certainly not positively, but might add some important additional ingredient which would help to understand the dimensions of the problem.

Talmadge: You do not think—

Ehrlichman: Sir, I cannot vouch for this. I have a kind of an inherent personal doubt about the psychiatry in general, but I cannot second-guess, I cannot second-guess the investigation experts who have used this technique and, as I say, the CIA maintains a staff and they do this thing on a regular basis and it is used in our Government.

Now, I understand from testimony before the McClellan Committee that the CIA's position is that they have not ever used it before in a case of espionage involving a United States citizen. I do not know whether that is so or not. But in any event, the people involved here were very concerned about what they were dealing with, and they felt that this would be a helpful technique.

Talmadge: You did not think that Dr. Fielding was a security risk to the country, did you?

Ehrlichman: Of course not, no. The identity of the individual here had nothing to do with it, the doctor. The CIA had prepared a psychiatric profile, and it was not helpful.

And when Mr. Young wentback to the CIA and said, "This is not helpful, they said, "Well, we do not have enough raw material to go on. You are going to have to get us some more factual information," and so this was then an expansion of the original covert investigation of this individual and his co-conspirators and his pattern and how he got these documents and so on to include the assemblage of such other information as might be helpful to the CIA in finishing this psychiatric profile project . . .

Talmadge: Now, did the President authorize that break-in?

Ehrlichman: Not in express terms, no sir. At least not to my knowledge.

Talmadge: As a matter of 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 specific 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

See TEXT, A29, Col. 1

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 found 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. Ellsberg's friends were. That does not mean necessarily that the service station attendant was a coconspirator an 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 had meetings with John Dean on Jan. 3, 1973, Jan. 4, and Jan. 5.

Would you tell the committee what the subject of those meetings was, beginning with the third?

Ehrlichman: On Jan. 3, I met twice with Mr. Dean, once alone at noon and once at 7 p.m. with (former presidential counsel) Mr. Charles W.) Colson. The meeting with Mr. Colson related to a letter which Mr. Dean had told me about at our earlier brief meeting, and this was a letter which I believe Mr. Colson had received from Mr. Hunt. I believe I am correct about that. It was a very melancholy and a very passionate kind of letter. I think the letter is in the record, as a matter of fact. And it talks about his being abandoned by his friend and so on. It was on the heels of Mr. Hunt having lost his wife (in a December airplane crash).

Mr. Colson was genuinely concerned and shaken by this. He had had long friendship with the Hunts, both Mr. and Mrs., and he had proposed to Mr. Dean that he get together with Hunt or with Hunt's attorney, at least, to register his continuing friendship and his compassion for Hunt's loss of his wife and so on, and so that Hunt would not feel that he had been abandoned by his friend . . .

Mr. Dean raised the cautionary warning that if anybody from the White House sat down with Mr. (William O.) Bittman (Hunt's attorney) in a situation like this, that there was an inevitable opportunity for misunderstanding as to the purpose of the meeting, as to assurances that might or might not be given, and so forth.

Clemency was obviously at the forefront of everybody's mind in this meeting as one of the things which