Excerpts From Interpretations of Presidential Powers at Watergate Hearing

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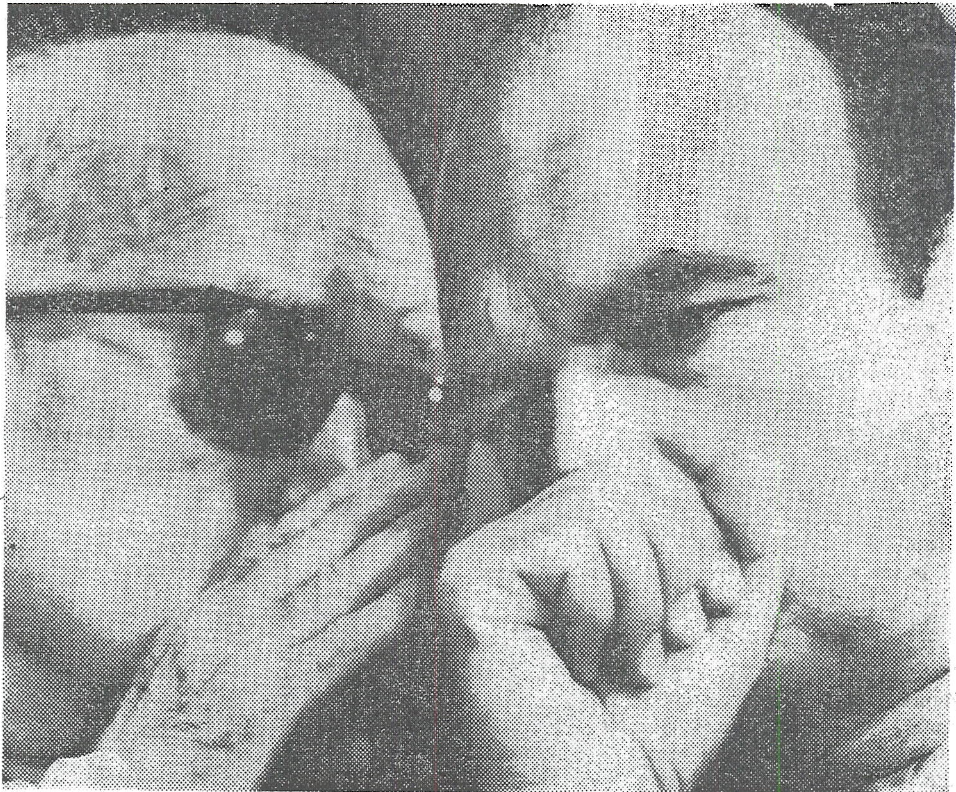
WASHINGTON, July 25—Following are excerpts from the transcript of testimony today on the Watergate case before the Senate Select Committee on Presidential Campaign Activities dealing with the legal question of whether the President, under his "implied powers," can approve actions in the interest of national security that would otherwise be illegal. The participants were John J. Wilson, the attorney for John D. Ehrlichman; Senator Sam J. Ervin Jr. and Senator Howard H. Baker Jr.



Associated Press

John D. Ehrlichman, right, and his attorney, John J. Wilson, confer during testimony

SENATOR ERVIN: The committee will come to order. 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.

MR. WILSON: I want to say sincerely I am very grateful to you for giving me this opportunity. I have a feeling you have your own thoughts about this, and this may turn out to be an exercise in mental calisthenics but it will be fun anyway.

I cannot quote the Bible like you can but I am reminded of the high school physics anomaly and what happens when the irresistible force meets an immovable body, and I do not know which is which at the moment. Thank you, Senator.

Now seriously, if I may, in connection with [Title 18] Section 2511 [of the United States Code] our exchange yesterday was so rapid that I was not able to get across to you the genesis of my thinking. Twenty-five eleven, to me, is a symbol. I would not rely upon 2511 as a source of power [for the President]. It is a recognition of the possibility of a source of power, and I want to make a distinction immediately between domestic security [and security against foreign intelligence] because I want to take my text from the Supreme Court's decision of last year in the case which has been variously called the Keith case because it involved a mandamus against Judge Keith in the Eastern District of Michigan, or the Plamondon case, because he was the principal of three conspirators in that action.

A Familiar Decision

The case formally is known as United States, petitioner, against the United States District Court for the Eastern District of Michigan. It is found in 407 United States, and 92 Supreme Court. I am sure the chairman and maybe all members of the committee have a familiarity with this decision. It is a tremendous decision written by Mr. Justice Powell with concurring opinions by Mr. Justice Douglas and Mr. Justice White.

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.

There is a Senate report, 1096, I think it is, on the Safe Streets Bill of 1968, of which 2511 is a portion, and in the report [there is] 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, I anticipated that if anybody has inquired into some of the things which I have done in the practice of the law, 21 years ago I was in the steel seizure case. I filed the first suit on behalf of Youngstown Sheet and Tube, and the case today bears the name of my client. In that case I fought vigorously against the inherent power of President Truman [in the seizure]. 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 Congress, by your own committee, sir, by the bill which was passed.

Restriction Not Intended

In the Keith or Plamondon decision, both Senator McClellan who, I believe, was the chairman of the Judiciary Committee [Senator Eastland is the chairman] and Senator Hart, were quoted in their debate of 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 proposition is, and I want to come to the Plamondon case, my proposition — succinctly stated, on the basis of my reading of the Supreme Court's decision in the Plamondon case — is that in a domestic security case, and that was that case despite the fact that Plamondon bombed [a] C.I.A. headquarters, it was treated by the Supreme Court time and time again as a domestic security case, and I do not have to rely upon inferences when I tell you that the Supreme Court said, "We are not passing upon the power of the President with regard to foreign intelligence."

Now, the proposition that I am offering to you and other members of the committee, if you please, sir, is that while it has been settled in the Plamondon case that for domestic security purposes the Fourth Amendment [the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures] rear its protective head and despite whatever may be the constitutional power of the President, he must apply for a prior judicial action in order to carry

out wiretapping of a domestic security case. [The Fourth Amendment also says: "No warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."]

The Warrant Clause

Mr. Justice Douglas calls the Fourth Amendment the warrant clause, and he does what I think all scholars do in this area, in that the warrant clause seems to be a clear part of the preceding provision in the same article for there shall not be any unreasonable searches and seizures.

Also you know seizures which are reasonable may be done. You know, of course, that the warrant clause does not always apply to searches and seizures. You know that an arrest by a police officer of a felony on the probable belief that a felony was committed where he arrests a man inside his house, he may search the house or the immediate vicinity of where the arresting man is. He does not have a warrant. He did not have the warrant for the arrest, he did not have the warrant for the search, so there is some incursion upon the idea of searches and seizures.

But coming directly to how I read the Keith or 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 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.

Justice Powell's Imprimatur

But whether it has before or whether it has not, the imprimatur of the Supreme Court through Justice Powell has now 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 duty 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, 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 [approving a wire tap.]

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 are not subject to judicial attack.

Now the Supreme Court in the Plamondon case—

SENATOR ERVIN: Isn't that the same case as United States vs. United States District Court?

The Formal Citation

MR. WILSON: I gave it a few minutes ago as being the formal citation. I didn't want to have to say that every time I cite the case.

SENATOR ERVIN: Yes, I don't like to have to use that hard-to-pronounce surname.

MR. WILSON: Now, nobody can dispute me on one point, and I am sticking my neck way out, that the Supreme Court reserved the question of 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 [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 permitting the President to do what would otherwise 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 wiretapping is a form of invasion of the premises of the person who is overheard, and in the Katz and Berger cases, with which I am sure all of you are familiar, the Supreme Court has said now in this sophisticated age wiretapping is another kind of invasion of the privacy and premises of the man whose conversation is being bugged.

Proposition Defended

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 us to contend that an entry into the psychiatrist's office under grounds which would technically state burglary, because there is no Federal crime in that respect, is no different from an entry through his telephone system.

And I don't find that you, sir, or anyone else [on the Judiciary Committee] 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. That is the reason, sir, that I made so bold yesterday, when I asked you to read the latter part of the first sentence (of Section 2511) — as to protect national security information against foreign intelligence activities.

This is the kind of thing which I pick out of the symbol of 2511, lay it on top of the Plamondon case, and say that today there is no one living, indeed there is no one in this room who can assert with categorical 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.

Let me just conclude by quoting one [sentence from Justice Powell's opinion in the Plamondon case]:

"We emphasize before concluding this opinion the scope of our decision as stated. At the outset this case involves only the domestic aspects of national security. We have not addressed and express no opinion as to the issues which may be involved with respect to activites of foreign powers or their agents."

SENATOR ERVIN: Well, Mr. Wilson, I have enjoyed your argument. I have long known you to be one of the nation's truly great lawyers, and I would like to say, I am sort of a country lawyer myself and sometimes I get sort of emphatic in the statement of my views, because I have never been able to straddle fences very well.

I agree with your interpretation of the case of U.S. v. U.S. District Court. 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 [in] Section 2511.3 the Congress recognizes the President's authority to conduct such [domestic security] surveillances without prior judicial approval. Justice Powell said Sections 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.

Ultimate Decision

Then his ultimate decision was, 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 of title 18 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 Presiednt and, of course, the Congress, from exercising tyrannical power.

While I do not agree that this case has any application whatever to the situation, where you and I part company is on the facts.

Domestic Subversion

I think we have a rather anomalous situation here. Here was the Government—they were not prosecuting Ellsberg through the agents of the Department of Justice for giving papers to Russia. They were just merely charging him with stealing some papers that belonged to the Government, as I recall. And here were some employes of the White House that go out and for some strange reason, —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 [Dr. Ellsberg's psychiatrist] 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.

No Inherent Power

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 the destructions of themselves at the hands of the enemy, I think that is authority that he has no inherent power to steal a document from a psychiatrist's office in time of peace.

SENATOR BAKER: I would like to suggest one or two more points that you Mr. Wilson might like to reply to when you do reply to the statement of the chairman.

There is no doubt in my mind that there is the doctrine of implied power of the Presidency, and implied powers of the Congress. This committee sits by reason of implied powers. There is no reference in the Constitution to the authority of a Congressional committee to conduct this investigation, but the power is clearly ancillary and necessary to the functioning, to the intelligent functioning of a legislative body.

The question is how they are implied, to what extent, and what do they say? If we address ourselves carefully to the proposition that Mr. Wilson suggests, that there is a reservoir of power in terms of national security, not spelled out with particularity in the Constitution but necessary as an aid to the functioning of the Presidential role as Commander in Chief and as chief executive officer of the Government, and that they include an abridgement, if you please, for the Fourth Amendment in the event that the national security role applies, then it seems to me that traditional and ordinary rules of construction require us, first, to look at the Constitution and all the amendments to see whence and from what source, what amendment, such a power might flow.

And if we might find conflict, as your theorem suggests, between the inherent power of the Commander in Chief or the chief executive of the Government to protect the national security vis-à-vis foreign activity, the fairly explicit and direct requirements of the Fourth Amendment of the Constitution [we have a responsibility] to reconcile them as we can, just as we try to reconcile the apparently conflicting testimony of witnesses who appear before this committee.

That, then, finally leads me to the question I would like to put. It seems to me that we have a factual question here. It's entirely possible to construct an attractive legal theorem that the President does or does not have this inherent authority, this reservoir of power, in terms of national defense. But don't we have to test both of those theorems against a range of factual situations?

And, therefore, isn't the central fact issue "probable cause?" That is, what basis was there for believing that there was a foreign security threat before the Wilson theorem would apply, even in opposition to the Ervin theorem? So aren't we confronted with what we have been confronted with more or less throughout these hearings? And that is, what do the facts show? What's the reasonable basis for believing that a national security problem existed and of what gravity before we can apply ourselves to the abstract theorem of law.

SENATOR ERVIN: I don't believe Mr. Ehrlichman conceded that the President of the United States was the man who ordered this burglary. I thought this burglary was carried out by Mr. E. Howard Hunt and I don't thing Mr. E. Howard Hunt has any implied or inherent power in the Constitution of the United States to commit burglary.

MR. WILSON: Justice Powell puts a footnote [in the Plamondon case] 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. So that I am arguing that when it comes to the exercise of this reservoir of power in a foreign intelligence case, it is the President's discretion which is to be guide.

The genesis of this was either the fact that the papers that were passed to the Russians or that there was reasonable ground to be, probable cause, Senator Baker, 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.

I want to end by reading what the Judiciary [Committee said] under the head of national security:

"It is obvious that whatever means are necessary should and must be taken to protect the national security interest. Wiretapping and electronic surveillance techniques are proper means for the acquisition of counterintelligence against the hostile action of foreign powers. Nothing in the proposed legislation seeks to disturb the power of the President to act in this area. Limitations that may be deemed proper in the field of domestic affairs of a nation become artificial when international relations and internal security are at stake."