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Ervin and Lawyer in Clash
Over Power of Presidency

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WASHINGTON, July 25—The testimony of John D. Ehrlichman before the Senate's Watergate committee was delayed for nearly an hour today while the committee chairman and Mr. Ehrlichman's lawyer conducted a scholarly debate on whether a President had 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

Excerpts from exchange of legal arguments, Page 26.

entirely decided by the courts, remained unresolved after this morning's learned and lively exchanged 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 Senator Ervin yesterday, after he and Mr. Wilson clashed over the legality of a burglary, di-

rected by White House aides, of the office of a psychiatrist who had once treated Dr. Daniel Ellsberg. The burglars were participating at the time in a "covert operation," approved by Mr. Ehrlichman, then chief domestic Presidential adviser, to obtain a psychiatric history of Dr. Ellsberg, who has admitted making the Pentagon papers available to the press.

Mr. Wilson appeared before the committee well fortified with texts and documents. 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, bur-

Continued on Page 26, Column 5

Continued From Page 1, Col. 7

glary, 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 Dr. Ellsberg's actions represented.

Senator Ervin, who like Mr. Wilson is in his seventies, retorted that Dr. 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, and he added that Dr. Lewis I. Fielding, the psychiatrist, "was not engaged in any foreign intelligence activities" either.

The burglars, Mr. 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."

But Mr. Ervin made it clear that he did not believe that such a burglary could have been justified in any circumstances.

"Some people believe in a doctrine of inherent power," he said with a pointed glance at Mr. Wilson. "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."

The debate was concerned with what amounted to a moot point.

Mr. 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 Mr. Ehrlichman directed in late 1971. The two men, G. Gordon Liddy and E. Howard Hunt Jr., were subsequently sentenced in the Watergate wiretapping case.

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

Nevertheless, Mr. 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 upon a showing of "probable cause."

Even Congress, he maintained, 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 Senator 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, Mr. Wilson said, 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 detain "essential" foreign intelligence information "or to protect national security information against foreign intelligence activities."

Mr. Ervin said that he recalled the paragraph, and with eyes twinkling and brows dancing added:

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."

Mr. Wilson said that 20 years ago he argued the exact opposite of the position he was now taking while a lawyer for Yongstown Sheet and Tube Company in the so-called steel-seizure case.

In that case, which Mr. 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.

Mr. Ervin then commented: "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."

Senator Howard H. Baker Jr., the committee's ranking Republican member, then intervened.

"I would like to suggest one or two more points," he 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 Dr. Ellsberg's psychiatric records, the object of the burglary, had been needed to ward off a threat to the country's security.