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# Impeachment Issue: Did the President

Perhaps the least publicized alleged abuse of power contained in the House Judiciary Committee's draft impeachment Article II is that surrounding the charge that President Nixon "endeavored to use the executive power to interfere with the proper administration of the Federal Bureau of Investigation." Yet few of the other activities uncovered in the course of the committee investigation so directly involve a questioned presidential action.

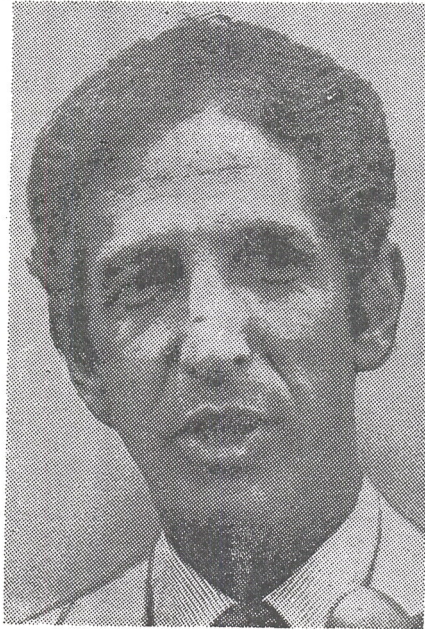
The focus of this charge is the concealment, by order of the President, of the logs, letters and memoranda associated with the so-called national secu-

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urity wiretapping to find news leaks undertaken by the FBI at the direction of the President from May 1969 to February 1971. The issue is not the questionable purpose for which home telephones of National Security Council staffers, other White House and government officials and newsmen were tapped; that is another part of the impeachment article. Rather, this proposed article is based on evidence that the President sought to conceal the existence of the tap records to avoid their having to be produced in response to a legitimate court order at the Pentagon Papers trial of Daniel Ellsberg.

One of the 17 persons tapped in the 1969-1971 program was Morton Halperin. That tap began May 12, 1969 when Halperin was a member of the National Security Council staff. It continued for 21 months—until Feb. 10, 1971—even though Halperin left government service in September 1969 and subsequently went to work as a consultant to Democratic presidential candidate Edmund Muskie. According to a 1973 FBI report surveying the Halperin tap reports, Ellsberg was overheard via the Halperin tap on 15 different occasions.

On July 2, 1971, four days after Ellsberg was indicted for violation of the espionage statute in connection with the Pentagon papers, Assistant Attorney General Robert Mardian, who was running the case for the Justice Department, made a routine request from the FBI for any "electronic surveillance information" regarding Ellsberg. The purpose was simply to get what-



Daniel Ellsberg



Robert C. Mardian

ever information the Bureau might have and to prepare to meet the inevitable request from Ellsberg's lawyers that any wiretap material be supplied prior to trial.

By presidential order, the White House's 1969-71 taps were not listed in the regular Bureau indices. The reports were maintained separately in the office of Assistant FBI Director William Sullivan.

On July 9, 1971, a week after Mardian's first letter went to the Bureau, a second request came over to the FBI, this time from Mardian's assistant. He asked for wiretap records on a number of individuals involved in the Ellsberg case, among them Morton Halperin.

At about the time of the two inquiries, Assistant FBI Director Sullivan visited Mardian. He told Mardian of the White House wiretaps and of his supposed fears that FBI Director J. Edgar Hoover—with whom Sullivan was feuding—would force a turnover of the hitherto secret taps. As an FBI memo some months later recorded, "It goes without saying that knowledge of this coverage represents a potential source of tremendous embarrassment

to the Bureau and political disaster for the Nixon administration. Copies of the material itself could be used for political blackmail and the ruination of Nixon, (Attorney General John) Mitchell and others of the administration."

On July 10, 1971, John Ehrlichman's notes of a presidential meeting in San Clemente include the entry: "Re: grand jury—don't worry re taps on discovery—re (White House)." In legal parlance, "discovery" is the process whereby defendants seek out material related to the prosecutor's investigation. On that same day, July 10, Mardian was called from the Western White House and asked to fly from Washington to San Clemente to meet with the President.

On July 12, 1971, according to Ehrlichman's logs, Mardian met with the President. In his Senate Watergate testimony, Mardian said the main part of the conversation dealt with the Ellsberg case. By that time, the White House had mobilized a special task force to deal not only with the legal pursuit of Ellsberg but also to organize a public relations campaign. According to Ehrlichman, the President was dissatisfied with the Justice Department

# Conceal Wiretap Records?



William Sullivan

progress on the Ellsberg case and, at that time, decided to designate "a White House man in charge."

A second issue at the July 12 meeting was how to handle the records of the 1969-1971 wiretaps. Again, according to Mardian's testimony, the President told him directly to gather the FBI material from Sullivan and deliver it to Ehrlichman in the White House. Why was this done? Mardian has said the purpose was to prevent FBI Director J. Edgar Hoover from using the files as blackmail against the President. But the House Judiciary Committee material points in another direction—the President wanted to prevent the material from being disclosed during the Ellsberg trial. Another possibility can be suggested. Within days after the July 12 meeting, the "plumbers unit" was formed as a task force on the Ellsberg investigation. E. Howard Hunt, then a consultant to the White House, had suggested all government material on Ellsberg be gathered within the White House. He later testified to the Ervin committee that he had reviewed wiretaps of Ellsberg conversations. The only such wiretaps

known to date are among the 1969-1971 files.

Mardian returned to Washington after his conversation with the President with orders to collect the files. On July 13, 1971, Mardian was sent a memo from the FBI reporting there were no records of Ellsberg being picked up by Bureau taps. Three days later Mardian was sent a second report; this one indicated Halperin had *not* been the subject of a wire tap but had been overheard on a wiretap involving others.

At about this time, Sullivan had an assistant deliver to Mardian a satchel containing all the Bureau's records which he maintained of the 1969-71 White House taps. In turn, Mardian delivered them to the White House, though it is not clear to whom the files were given—to the President or to Ehrlichman. Ehrlichman told the Senate Watergate Committee the President ordered him "to take custody of them." Thereafter they were held in a file safe in Ehrlichman's outer office.

In October 1971, Hoover fired Sullivan. In checking over the files, after Sullivan's departure, Hoover found the White House wiretap records were missing. An FBI investigation at that time turned up contradictory stories as to what had happened. It was discovered that Sullivan had turned the files over to Mardian without informing Hoover. Thereafter, however, Mardian allegedly told the Bureau he had destroyed the records while then Attorney General Mitchell was telling Hoover that "they had been turned over to Mr. Ehrlichman at the White House."

In November 1972 and January 1973 as part of the motions in the Ellsberg case, Judge Mathew Byrne ordered the government to search its records and report any tapped conversations involving Daniel Ellsberg and, in the latter orders, Morton Halperin. At all times the government made no disclosure of the conversations that had been monitored as part of the White House taps.

On February 26, 1973, Time magazine published a story which accused the FBI of tapping White House aides and newsmen. An internal FBI memo dated Feb. 26, 1973, discussed the tapping program, in effect confirming the Time story. It also reported the tap

files, according to Mitchell, had been sent to Ehrlichman in the White House, while Mardian said he destroyed them. The FBI report, prepared for Assistant FBI Director W. Mark Felt, was reportedly delivered to then Acting FBI Director L. Patrick Gray.

Former White House Counsel John Dean, at the moment the Time story appeared, checked with Ehrlichman and was told to deny the story, even though it was essentially true. Gray, on behalf of the FBI, also denied it both to the press and while under oath to the Senate Judiciary Committee during his unsuccessful confirmation hearings.

On April 27, 1973, Gray resigned his Bureau post after news stories disclosed publicly he had destroyed material obtained from the safe of a Watergate conspirator. His replacement, William Ruckelshaus, began an inquiry into the White House taps on May 4, 1973, in response to a newspaper story. He was told that day that the tapping program had taken place. On May 9, Ruckelshaus was told then an FBI employee recalled Ellsberg had been overheard on those taps. That information was immediately sent to Judge Byrne at the Ellsberg trial. The judge immediately ordered an investigation to uncover the tap records and files.

The President, Ehrlichman and Mardian did not step forward at that moment in response to Judge Byrne's order, though all three knew the records were in Ehrlichman's White House office. On May 10, FBI agents interviewed Mardian in Arizona and Mitchell in New York. Both now said Ehrlichman had the files. By the time Ehrlichman was interviewed the next day and the files located, Judge Byrne had dismissed the case—the files did not have to be turned over to Ellsberg's lawyers. In his decision to dismiss, Judge Byrne cited misconduct on the part of the government, specifically citing the failure to produce the wiretap files.

The President has never been questioned on his July 12, 1971 order to Mardian to get the files from the Bureau and place them in the White House. Nor has he been asked why he did not order Ehrlichman to produce the wiretap records in response to Judge Byrne's May 9, 1973 request. Now his actions have become part of the impeachment process.