# Ehrlichman Case

# Verdict Upheld

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## 2 'Plumbers' Convictions Overturned

By Timothy S. Robinson
Washington Post Staff Writer

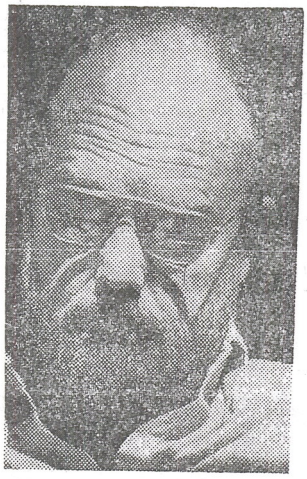
The U.S. Court of Appeals yesterday upheld the conviction of John D. Ehrlichman, President Nixon's chief domestic affairs adviser, on charges stemming from Ehrlichman's authorization of the break-in by the White House "plumbers" unit of Daniel Ellsberg's psychiatrist's office.

The appeals court rejected Ehrlichman's defense that his authorization of the break-in was legal because he acted to protect national security, and served notice that that argument does not justify questionable acts by White House or other federal employees. The court, however, did not rule on whether a President or Attorney General legally could approve such an act to protect national security.

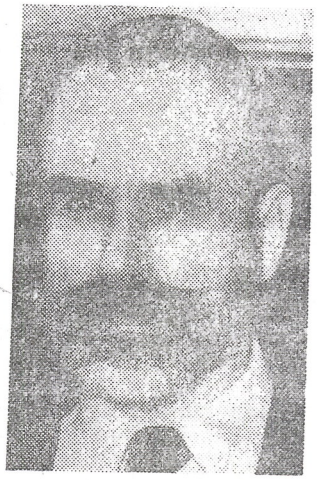
The court also reversed the convictions of two men who actually broke into the office of Dr. Lewis Fielding, the psychiatrist for Ellsberg. Ellsberg was tried on charges of leaking to the press the secret Pentagon Papers study of American involvement in Southeast Asia, but the case was dismissed.

The appeals court ruled that the trial judge failed to instruct the jury that the two men, Eugenio R. Martinez and Bernard L. Barker, may have believed that breaking into Fielding's office was legal because the White House had approved it.

See APPEAL, A6, Col. 1



JOHN D. EHRLICHMAN
. . . defense rejected



G. GORDON LIDDY
. . . conviction affirmed

### APPEAL, From A1

In another opinion released yesterday, the appeals court affirmed the conviction of G. Gordon Liddy, another member of the Nixon White House "plumbers" unit that was assigned to investigate leaks of allegedly classified material. Liddy is serving a 1-to-3 year prison term for that conviction concurrently with a 6-to-20 year term being served for his part in the Watergate break-in.

The four men were convicted 22 months ago. According to trial evidence, the break-in was authorized after Fielding objected to FBI questions about his doctor-patient relationship with Ellsberg.

Unless the case is appealed, Ehrlichman will soon have to begin serving a 20-month to five-year prison term for his conviction on conspiracy and perjury charges. Barker and Martinez received suspended sentences, so the rulings have no effect on their incarceration.

Ehrlichman could not be reached yesterday for comment. One of his attorneys said that the former White House aide had been informed of the ruling and a decision would be made within the next week on whether to appeal it either to the full nine-member U.S. Court of Appeals or to the U.S. Supreme Court.

In its ruling yesterday, the three-member appeals court carefully staked out its views on the use of national security as a defense in the Ehrlichman case specifically and in other cases that may come before it.

"Ehrlichman soars into a novel claim of authority" he did not have, wrote U.S. Circuit Judge Malcolm R. Wilkey. Pointing out that the use of national security as a defense is "subject to abuse" unless carefully limited, Wilkey wrote that "that risk is substantially magnified when the decision-making group, as here, is an amorphous, ad hoc unit with no tradition of public service and no clear lines of responsibility."

"The law is plain that the simple fact that the President asks a subordinate official to investigate and report on a problem involving national security does not give the official plenary power to exercise all prerogatives the President might have in that area," Wilkey said.

Ehrlichman maintained that he thought the break-in was legal because of the general orders he had been given by then President Nixon to track down the leaks of information. Ehrlichman argued further that it would be "absurd" to have the President specifically chart out the methods he intended to be used in the investigation of leaks.

U.S. District Judge Gerhard A. Gesell had ruled during the trial that the President did not have the authority to approve war-

rantless break-ins, and that even if such authority existed it would have to be invoked by the President or the Attorney General personally.

"As a constitutional matter, if and to the extent that Presidential approval may replace judicial approval for foriegn intelligence gathering, the personal authorization of the President—or of his Cabinet alter ego for these matters, the Attorney General—is necessary to fix accountability and centralize responsibility for insuring the least intrusive surveillance necessary and preventing zealous officials from misusing the presidential prerogative," Wilkey said.

While agreeing with Wilkey's general ruling, the other two appellate judges—U.S. Circuit Judge Harold Leventhal and visiting U.S. District Judge Robert Merhige of Virginia — joined in a separate opinion to discuss the two distinct government positions concerning unauthorized break-ins that had been presented in the Ehrlichman case.

The Watergate special prosecutor's office had argued that warrants must be obtained for all break-ins by government officials.

However, the Justice Department later filed a brief with the court in which it maintained that warrantless searches "are justified under the proper circumstances when related to foreign espionage or intelligence."

Judge Leventhal said he was "troubled . . . because the position is asserted by the Department of Justice, the law department of the executive branch, and has reverberations. The very assertion of the exception by the Department of Justice accomplishes some diminution of the sense of privacy of all."

"The basic premise of stated Fourth Amendment law—that in the absence of exigent circumstances a physical search is per se unreasonable without a judicial warrant—is thus to be sacrificed on the altar of security . . .," Judge Leventhal continued in response to the Justice Department's arguments.

In its reversal of the convictions of Barker and Martinez, the appeals court accepted for the first time the legal arguments of the Watergate "footsoldiers" who said they thought the break-in was legal because they were enlisted for it by their longtime CIA friend and then White House employee, E. Howard Hunt.

"There was abundant evidence in the case from which the jury could have found that the defendants honestly and reasonably believed they were engaged in a top-secret national security operation lawfully authorized by a government intelligence agency," Wilkey said in his statement of the facts that would apply to such a jury instruction.

Wilkey also said there was legal theory to support their contention that Hunt could have possessed the authority to recruit them. "That the President had the authority to confer upon a group of aides in the White House 'more authority than the FBI or CIA' (as Hunt told the two men) was in 1971 and is now by no means inconceivable as a matter of law," Wilkey added.

In unusually strong language, Wilkey referred pointedly to the Justice Department's recent decision not to prosecute former Central Intelligence Agency director Richard Helms for personally authorizing a 1971 break-in at a Fairfax photographic studio as part of a national security violation investigation Justice Department officials said at the time they thought Helms had a legitimate national security defense.

". . . Of one thing I am certain: In 1971 there was not in the United States of America one Fourth Amendment for Richard Helms and another for Bernard Barker and Eugenio Martinez," Wilkey said.

Judge Merhige generally agreed with Wilkey's ruling that the jury should have been given a limited instruction as to the possibility that Barker and Martinez acted in good faith that their acts were legal.

Leventhal's dissenting opinion was preceded by what the judge called "an opening exclamation of puzzlement and wonder" at the majority's reversal of the Barker and Martinez convictions.

Pointing out that Barker and Martinez had been shown sympathy when Judge Gesell sentenced them to probation instead of jail terms, he questioned the legal findings by the two majority judges.

"To give (the defendants) not only sympathy but exoneration, and absolution, is to stand the law upside down, in my view and to sack legal principle," Leventhal said.

"That this tolerance of unlawful official action is a defense available for selective undermining of civil rights laws (the defendants were convicted of conspiring to violate Dr. Fielding's civil rights) leads me to shake my head both in wonder and despair," he added.

He said the ruling would "ease the path of the minority of government officials who choose, without regard to the law's requirements, to do things their way, and to provide absolution at large for private adventurers recruited by them."

In other "plumbers" rulings yesterday, the appellate court:

- Rejected arguments by defendants who claimed they had no "specific intent" to break the law when they became involved in the break-in.
- Denied Liddy's contention that he was denied his right to a speedy trial because the state of California dropped burglary charges in deference to the pending federal charges here.
- Ruled that the withholding of secret congressional testimony did not hamper Liddy's defense.
- Approved Judge Geseli's ruling that ended with President Nixon's being submit-

**DANIEL ELLSBERG**
**. . . break-in not legal**

ted written questions concerning the break-in instead of being called as a defense witness.