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Andrew Hall, left, and William Frates here to present John D. Ehrlichman's appeal of his role in break-in conviction.

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Ehrlichman Seeks Overturn Of Break-In Role Conviction

By Timothy S. Robinson
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The trial judge's refusal to allow former presidential aide John D. Ehrlichman to raise the so-called "national security defense" at his trial on charges growing out of the Ellsberg break-in left the jury no alternative but to convict him, Ehrlichman's attorneys said yesterday.

The argument was made to three judges at the U.S. Court of Appeals here as attorneys for Ehrlichman and three other men convicted of violating the civil rights of the psychiatrist of Pentagon Papers codefendant Daniel Ellsberg attempted to have those convictions overturned.

Ehrlichman, former White House aide G. Gordon Liddy and Miamians Eugenio Martinez and Bernard L. Barker were convicted last July of a plot to break into the doctor's office and attempt to photograph Ellsberg's files without a warrant in violation of the doctor's civil rights. Ehrlichman also was convicted of two counts of lying to a grand jury investigating the break-in.

Much of yesterday's four-hour argument focused on the pretrial rulings of U.S. District Judge Gerhard A. Gesell, which barred the national se-

curity defense, and his instructions to the jury that the defendants' belief they were acting in good faith was no defense to the charges.

Ehrlichman contends that he approved a secret operation to gain access to Ellsberg's files as part of a program specifically ordered by the President to stop alleged leaks of classified material. He contends that while he did not specifically order a break-in as part of that program, a President can order such a warrant-

less entry in the interests of national security.

Ehrlichman's attorney, William S. Frates, said the rulings by Judge Gesell severely limited the amount of evidence that Ehrlichman could present to the jury about his belief that the entry was part of a national security operation.

Phillip Heymann, arguing the case on behalf of the Watergate special prosecutor's office, said the President does not have the right to order a break-in without a warrant, and there was no reason for Ehrlichman to believe that the President had such authority.

The Justice Department also has filed a memorandum with the court in this case, in which it argued the President might have such power in national security cases.

Even if that Justice Department argument were accepted in general, Heymann said, it should not be applied to a case such as this one where the burglary was carried out with "private volunteers . . . paid with campaign contributions."

The case was heard by U.S. Circuit Judges Malcolm R. Wilkey and Harold Leventhal, and U.S. District Judge Robert Merhige of Richmond. At least two of those judges, Merhige and Wilkey, indicated they felt Barker and Martinez may have been unfairly prosecuted in the case.

Merhige termed the conduct by former White House aide E. Howard Hunt Jr., the government agent who recruited the two men, as "outrageous" and said for the two men to be persecuted for their reliance on Hunt's authority "shocks my conscience."

Wilkey also questioned Heymann closely on the prosecution of the two men, whom he described as "foot-soldiers"

who had no reason to question Hunt's authority.

Judge Leventhal said that there are other mechanisms in the law—such as the sentencing discretion of the judge—to protect defendants caught up in such a situation, and that to overturn convictions on such a point might "open up a Pandora's box."

Liddy's attorney argued that his client's conviction should be overturned, among other reasons, because the trial judge had refused to approve a subpoena for materials being held by a congressional subcommittee.