

Panel Disputes President's Right To Bypass Law

Ehrlichman Cites Case Of Security

By Lawrence Meyer and Peter A. Jay
Washington Post Staff Writers

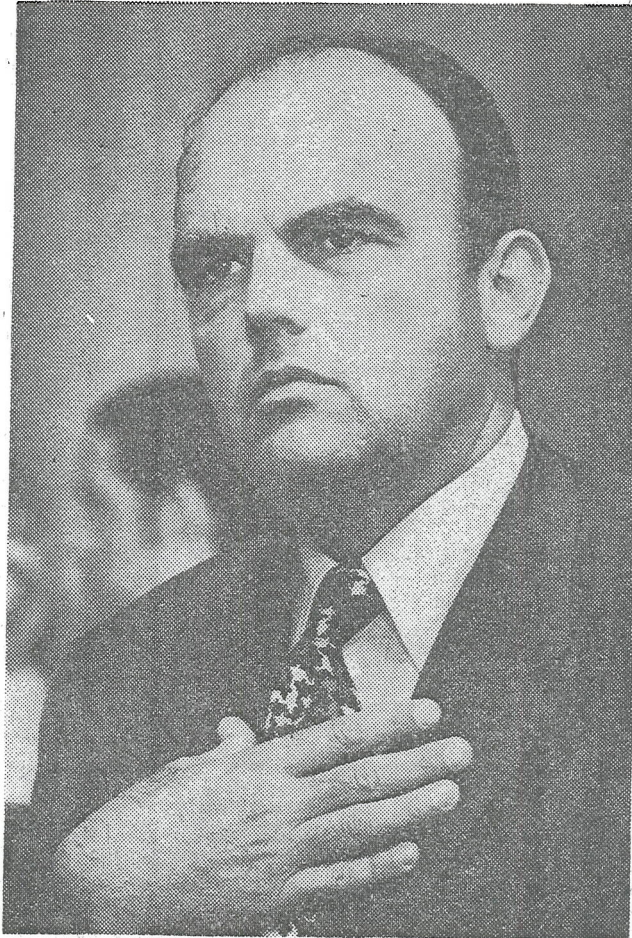
Former top White House aide John D. Ehrlichman's staunch declaration that the "inherent powers" of the President to protect national security can take precedence over individual constitutional rights provoked a clearly drawn debate on fundamental American principles yesterday in the Senate Watergate hearings.

The debate, which gave the hearings a new focus, pitted Sens. Sam J. Ervin Jr. (D-N.C.) and Herman E. Talmadge (D-Ga.) against Ehrlichman and his attorney, John J. Wilson. Focusing less on fact than on political philosophy, both sides reached back into American and English history and law to argue their points.

The prolonged constitutional discussion was begun by Ehrlichman's assertion Tuesday that the White House-authorized break-in at the office of Daniel Ellsberg's psychiatrist in 1971 was legally within the President's power to protect national security. The debate ranged far beyond that incident, however, as Ervin and Talmadge questioned the constitutional limits of a President's authority to act outside the law.

With Ehrlichman and his lawyer, Wilson, relying on the doctrine of "inherent powers" as a justification for a President to authorize illegal acts, Ervin and Talmadge took as their texts the Fourth Amendment to the U.S. Constitution's prohibition of "unreasonable searches and seizures" and an 18th Century speech before the British House of Commons by William Pitt the Elder.

"Now," Talmadge asked Ehrlichman at one point, "if the President could authorize a covert break-in, and you do not know exactly where that power would be



By Frank Johnston—The Washington Post.

Ehrlichman: "I had no part in any cover-up."

HEARING, From A1

limited, you do not think it could include murder or other crimes beyond covert break-ins, do you?"

"I do not know where the line is, senator," said Ehrlichman, formerly the President's top domestic affairs adviser.

Referring to Ehrlichman's experience as a lawyer, Talmadge asked, "Do you remember when we were in law school we studied a famous principle of law that came from England and also is well known in this country, that no matter how humble a man's cottage is that even the king of England cannot enter without his consent?"

"I am afraid that has been considerably eroded over the years, has it not?" Ehrlichman answered.

"Down in my country," Talmadge said, "we still think it is a pretty legitimate principle of law."

Although the conflict between national security and individual rights dominated the day's testimony—which was cut short by Senate

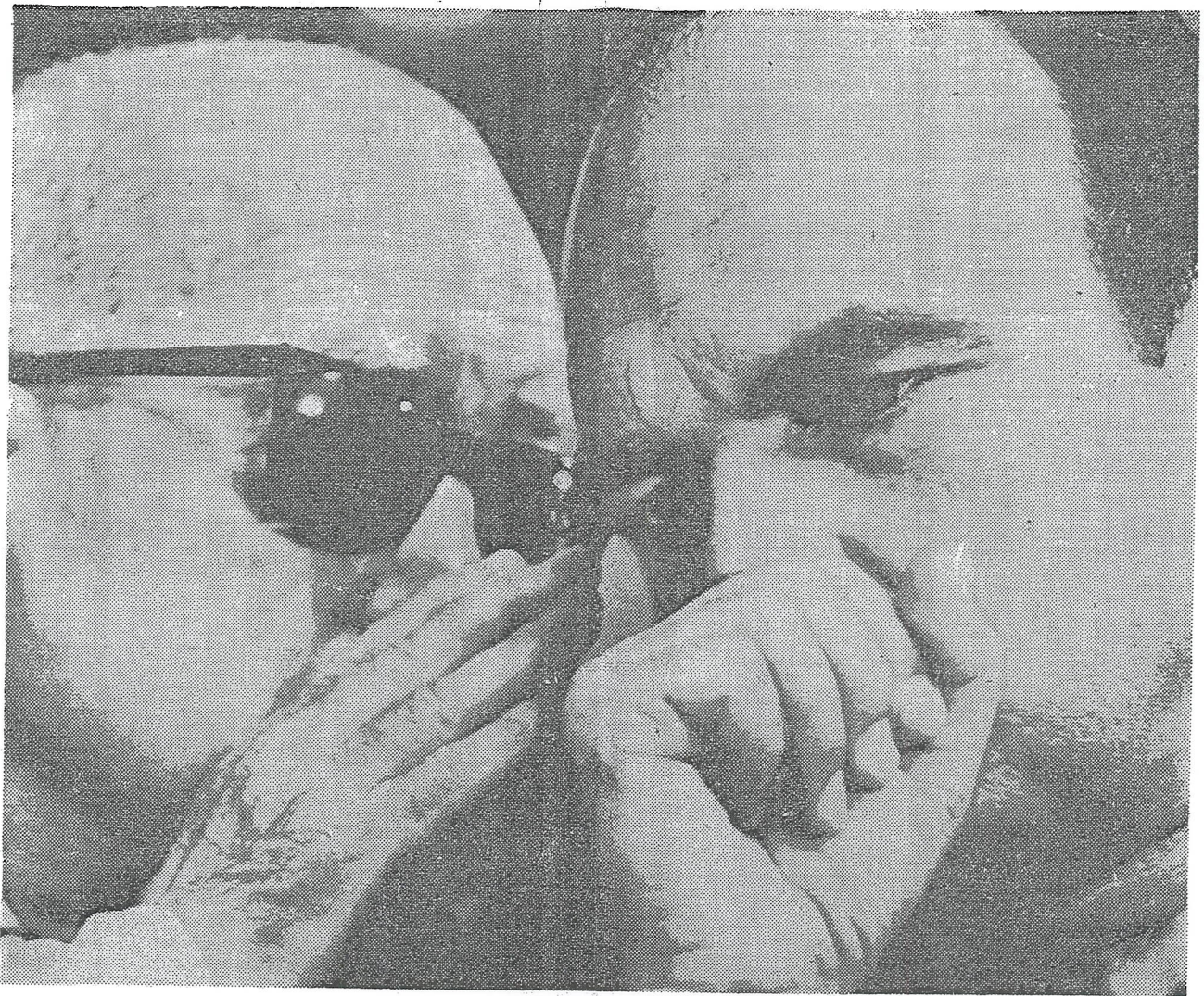
votes on amendments to the campaign spending reform bill prompted by the Watergate affair—Ehrlichman also gave significant testimony in several areas, including the Ellsberg break-in, that have come to public attention because of the Watergate affair.

During his testimony yesterday, Ehrlichman:

- Denied again that he specifically authorized the Ellsberg break-in, alternating his defense of the action with criticism of it as a shocking surprise to himself that could prove politically embarrassing.

- Denied discussing with President Nixon executive clemency for Watergate conspirator E. Howard Hunt Jr.

- Told the committee "the (Nixon) administration would have been far better off" if FBI Director J. Edgar Hoover "had been retired" before the Ellsberg episode in 1971, which Ehrlichman said was prompted in part by FBI resistance. Ehrlichman said Hoover "was alert and he was sincere, he was very patriotic but he was certainly fixed in



Associated Press

John D. Ehrlichman, right, confers with his lawyer John J. Wilson during Ehrlichman's testimony to committee.

his views, and it made operation very, very difficult."

- Denied telling White House counsel John W. Dean III that he should "deep six" documents found in Hunt's Executive Office Building office after the Watergate arrests on June 17, 1972.

- Denied suggesting to then acting FBI Director L. Patrick Gray III that he should destroy the Hunt documents.

- Defended his contacts with the presiding judge in the Ellsberg trial, U.S. District Judge Matt Byrne, while the trial was still in progress to sound him out about becoming director of

the FBI

The dominant issue of yesterday's session was the question of national security and individual rights. In a subdued mood after an angry argument with Ehrlichman Tuesday about the Ellsberg break-in, Ervin allowed attorney Wilson to begin yesterday with a courtroom argument on the President's "inherent powers" in national security matters

Wilson argued that both the Supreme Court and the Senate have recognized the "possibility" that a "reservoir of power" exists in the presidency "with respect to foreign intelligence, foreign leaks, this sort of thing."

In making his argument, Wilson referred to the historical irony that 21 years ago he had been on the opposite side of the question when he represented

Youngstown Sheet and Tube Co. in the steel seizure case of 1952. In that case, the Supreme Court rejected President Truman's assertion that he had the inherent power to seize the nation's steel mills to avert a strike that would jeopardize the Korean war effort.

The present situation, Wilson said, "is unlike that case because there is a reservoir of constitutional power recognized at least hypothetically by Congress . . ."

Wilson and Ehrlichman argued that the Justice Department had information that "sensitive documents" (other copies of the Pentagon Papers) had been turned over to the Soviet Embassy and that that was sufficient justification for the break-in at Ellsberg's psychiatrist's office. Although Wilson mentioned Ellsberg (who gave the Pentagon Papers to the New York Times) in connection with the Soviet Embassy several times, government sources say that no connection has been established between Ellsberg and any documents given to the Soviet Embassy.

Ervin disagreed with Wilson's argument at its conclusion, saying Ellsberg's psychiatrist "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 . . . to try to steal the doctor's notes were domestic subversion and not in defense of this country against foreign intelligence activities."

Some members of the Senate Judiciary Committee, (cited by Wilson in his argument), Ervin said, have "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 President and, of course, the Congress from exercising tyrannical power."

Ervin returned to the subject at the end of the day, prefacing his remarks by saying, "I said I wanted to amplify the legal discussion and I want to mention a little of the Bible, a little of history and a little of law.

"The concept embodied in the phrase 'every man's home is his castle' represents the realization of one of the most ancient and universal hungers of the human heart. One of the prophets described the mountain of the Lord as being a place where every man might dwell under his own vine and fig tree with none to make him afraid.

"And then this morning, Sen. Talmadge talked about one of the greatest statements ever made by any statesman, that was William

Pitt the Elder, and before this country revolted against the king of England he said this:

"The poorest man in his cottage may bid defiance to all the forces of the crown. It may be frail, its roof may shake, the wind may blow through it, the storm may enter, but the king of England cannot enter. All his forces dares not cross the threshold of the ruined tenements."

"And yet we are told here today, and yesterday," Ervin said, "that what the king of England can't do, the President of the United States can."

Ervin then referred to the Civil War case of *Ex parte Milligan* in which a civilian was tried for treason by a military tribunal that sentenced the man to death.

"Now, the argument was made by the government in that case that although the Constitution gave a civilian the right to trial in civilian courts, and the right to be indicted before a grand jury before he could be put on trial and then to be tried before a petit jury, the government argued that the President had the inherent power to suspend those constitutional principles because of the great emergency which existed at that time, when the country was torn apart in the civil strife," Ervin said.

The Supreme Court rejected the government's argument, Ervin said. He quoted Justice David Davis as saying, "The good and wise men who drafted and ratified the Constitution foresaw that troublous times would arise, when rulers and people would become restive under restraint and seek by sharp and decisive measures to accomplish ends deemed just and proper, and that the principles of constitutional liberty would be put in peril unless established by irrevocable law."

"And for these reasons, these good and wise men drafted and ratified the Constitution as a law for rulers and people alike, at all times and under all circumstances," Ervin continued. "Then he (Justice Davis) laid down this great statement: 'No doctrine involving more pernicious consequences was ever invented by the wit of men than that any of its provisions can be suspended during any of the great exigencies of government.'"

Without citing the specific source, Ervin said that President Nixon "himself defined the national security in one of his directives as including only two things: national defense and relations with foreign countries. How in the world the opinions of a psychiatrist about the mental state or the emotional state or the psychological state of his patient, even if his patient was Ellsberg, could have any relation to national defense or relations to a foreign country is something which eludes the imagination of this country lawyer."

Why, Ervin asked Ehrlich-

man, "if the President has this much power, would he not have had the inherent power" to send someone to rob Ellsberg's psychiatrist of the records at gunpoint rather than by burglary?

"I think that is the same question Sen. Talmadge approached," Ehrlichman replied, "and in a situation such as I put, for instance, where you knew there was going to be an atomic attack tomorrow, undoubtedly a measure of that kind might be necessary."

"Now," Ehrlichman continued, "somewhere in between there is a line. And the line depends obviously on a lot of things that you and I cannot settle here today."

"The connection, of course, between the psychiatrist's records and the psychiatric profile (of Ellsberg), and the determination of whether there was a spy ring or a foreign conspiracy which had taken these top secret documents and delivered them to a foreign power, it seems to me, is an unbroken chain of circumstances that explains itself," Ehrlichman said.

Earlier in his testimony, under questioning by Sen. Daniel K. Inouye (D-Hawaii), Ehrlichman had turned the tables on the committee:

"You get into these conflicting duty situations, as you know, senator, at times

and you have to take the main chance. You have to do the thing that is more important to the country and not do the other thing.

"It occurred to me the other day that it's very much analogous to the dilemma of this committee, where you are confronted with the conflicting rights of individuals, who may be prejudiced by this whole process on the one hand, and what you conceive to be the larger national interest. And you have resolved that conflict in favor of the larger national interest, even though some individuals may be harmed in the long pull by the process. And I can understand that."

As Ehrlichman explained it, "the larger national interest" in the Ellsberg break-in "was in finding out all we could about who and in what circumstances these vital national secrets, these Top Secret documents, were compromised."

The committee returned continually to the subject of the Ellsberg break-in yesterday, and although Ehrlichman held firm to his position that the act was legal, he said under questioning by Sen. Lowell P. Weicker Jr. (R-Conn.) that it reflected

"bad judgment" and that he would have disapproved it had he known about it in advance.

Weicker returned to a memo disclosed Tuesday from the two men—Egil M. Krogh Jr. and David Young—who headed the White House special unit known as

the "plumbers" that conducted the break-in. In the Aug. 11, 1971, memo Ehrlichman approved a "covert operation" to obtain Ellsberg's psychiatric files.

Ehrlichman again asserted that in approving the "covert operation" he had not had in mind a burglary, adding, "I do not think there is any question about the legal foundation which exists for an activity of this kind."

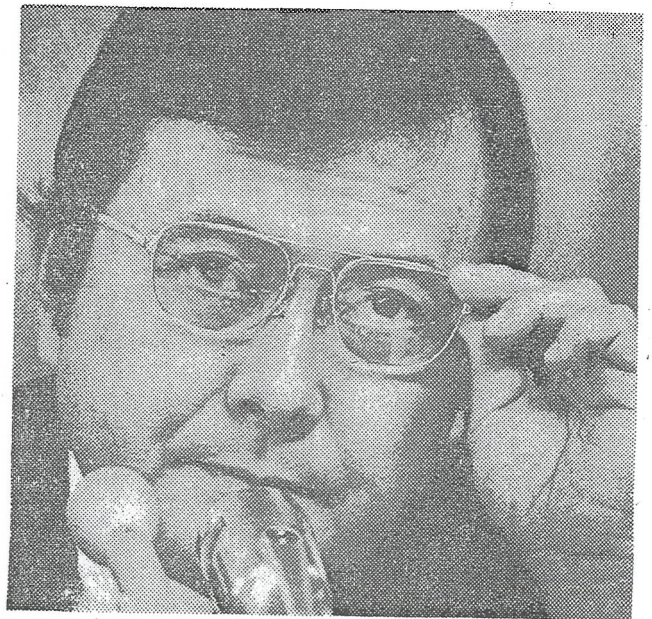
The operation was approved, Ehrlichman said, because Krogh had informed him that FBI Director Hoover was blocking a full-scale investigation of Ellsberg because Hoover was reportedly a close friend of Ellsberg's father-in-law, Louis Marx.

Contradicting his testimony on Tuesday that he did not think the break-in would be "politically embarrassing" if had been revealed, Ehrlichman said that a break-in was "potentially not only embarrassing in a political sense, or something of that kind, but totally out of keeping with the concept here."

"These fellows were going out as substitutes for the FBI, and the method, the style, the degree of investigation, which I understood was going to be conducted, would have been commensurate with that, not some different kind or category of investigation."

In approving a "covert operation," Ehrlichman said he thought the psychiatric files would be obtained under a "false pretense," or through enlisting the aid of another doctor or by a nurse or a nurse's aide.

"My disapproval" after being informed of the break-in, Ehrlichman said, "was because these people as far as I knew had been sent out there to do an investigation. I was under the assumption that it would be conducted as a normal investigation, not as some kind of a second-story job, and when I heard this my initial reaction to it was



By Joe Heiberger—The Washington Post

Sen. Daniel Inouye . . . "liar" remark denied

somebody has not exercised good judgment."

When Weicker produced a letter from Hoover to Krogh dated Aug. 3, 1971, in which Hoover said he was sending information on the Ellsberg investigation to Krogh, Ehrlichman rejected the letter as evidence that

Hoover was responding fully to the White House demands for an investigation.

"I think all of us who have had experience with Mr. Hoover recognize that letters of this kind were a method he had frequently of justifying short-fall in performance by the bureau," Ehrlichman said.

Hoover "was sort of cleaning out the drawers and sending over everything that had been accumulated to that time. Most of what was sent over, I will bet you, was old hat stuff," Ehrlichman said. He later referred to information that Hoover gave under similar circumstances as "stale bread . . . old stuff that has been in the file and they put together a big package and they send it over hoping that the sheer volume is going to impress you."

Weicker asked if a special secret agency should be established every time a government agency fails to perform properly.

Ehrlichman replied, "Oh, no, no indeed, no indeed . . . I think in retrospect that the administration would have been far better off if Mr. Hoover had been retired earlier, predating this episode, because many, many of the problems that we encountered were because of Mr. Hoover's very fixed views, very sincere."

Ehrlichman also testified, in response to questions by Inouye, that he had proposed to President Nixon that he resign from the White House staff rather than Mr. Nixon asking him for the resignation that was announced April 30.

Ehrlichman said he talked with Mr. Nixon on the phone on April 28 or 29. "The state of things was that I was to take a leave of absence, but stay on the White House staff and continue to perform as many of my functions as possible, given the need to answer charges and do all these other collateral things.

"The President was quite content with that at that time. (White House chief of staff) Bob Haldeman and I talked. We felt that from our respective standpoints that was simply not realistic. It was not viable. And it was we that proposed to the President that we make a clean break rather than the other way around," he said.

Under questioning by the committee, Ehrlichman gave some previously undisclosed details of his discussions last April with federal Judge Matt Byrne, who presided at the Los Angeles trial of Ellsberg in the Pentagon Papers case, about Byrne's possible appointment as FBI director.

Though the trial was then in progress, Ehrlichman said, he saw nothing unethical about discussing the possible appointment with the judge. He noted that he had discussed the meeting in advance with Richard Kleindienst, then the U.S. Attorney General, and as he was not following the trial closely he "had to depend upon the judge to tell me the proprieties in this matter."

The first meeting took place at the Western White House in San Clemente, Ehrlichman said. When Byrne arrived, he said, the two walked toward a bluff on the Pacific Ocean near Ehrlichman's office.

Ehrlichman said he told Byrne, "If at any point a subject arises that you feel in any way impinges upon your ability to fairly try the (Ellsberg) case you just turn around and walk away from me and, as I said before, this is not something that

needs to be discussed right now. We can talk about it later without prejudice."

"He said, 'Fine, let's proceed on that basis.' So we did."

Byrne showed interest in the FBI post, Ehrlichman said, and the next day, Byrne called and asked to talk with him again.

"I said (to Byrne), 'My mother lives a block from Palisades Park in Santa Monica. Why don't we meet there and have another walk,' " Ehrlichman told the committee.

"Again no offers were made, no acceptances," Ehrlichman said of the second meeting, which occurred two days after the first. "But I took this as an occasion when he wanted to restate his very strong interest to me in the position . . ."

Disclosure of the job offer to Byrne later in the Pentagon Papers trial was criticized by Ellsberg's attorneys as government interference in the judicial process and used as an argument for dismissal of the charges.

Byrne, in response to Ehrlichman's testimony, said yesterday—as he did during the trial when the offer of the FBI post was first disclosed—that he had told Ehrlichman he could not consider such an offer while the trial was in progress.

He also noted that "these discussions took place several weeks before disclosure to the court of the break-in at the office of Dr. Ellsberg's psychiatrist."

He said the reason he sought the second meeting so soon after the first was because Ehrlichman was about to leave California with the President.

Again and again during the day, the testimony moved away from the Ellsberg case only to be abruptly returned by a new question. Ehrlichman, as he did Tuesday, sought to establish that the government's view of the Pentagon Papers was formed by security concerns and not politics.

"This was not simply an effort to pick up gossip. This was an effort to crack what was at that moment the largest raid on top secret documents that had ever been made in the history of this government," he said.

He again denied that he had ordered the break-in, and that neither—"at least not to my knowledge"—had the President. But he said he remembered Mr. Nixon telling Krogh on July 24, 1971, that the leak-seeking "plumbers" unit was to "take such steps as were necessary."

Ehrlichman recalled that "the President put it to Mr. Krogh very strong" that the mission was an urgent one. He said he thought it was possible, as the President suggested in his May 22, 1973, statement on the Watergate case, "that one in Mr. Krogh's situation might well believe that he had been charged with taking extraordinary measures to meet what the President described in very graphic terms."

In his testimony, Ehrlichman indicated a certain ambivalence about the practice of psychiatry.

A Christian Scientist, he noted that he has "kind of an inherent personal doubt about psychiatry in general," but praised the Central Intelligence Agency's technique of creating "psychia-

tric profiles" of persons under investigation.

However, it was because he felt the profile provided on Ellsberg was inadequate, he testified, that he approved the Hunt-Liddy operation—but not that break-in.

Like that of other witnesses who have preceded him, Ehrlichman's testimony was well sprinkled with phrases couched in bureaucratise: "at this point in time," "this subject matter," "I'm not tracking with you" (when he did not understand a question), "my chopmark" (his written approval).

He also introduced some new terms: "papering the file," or answering a request for action with mountains of outdated but weighty memoranda; "clicking along on all eight cylinders," or giving a request top priority; "puffing," or promising a superior immediate action when none is intended.

As he did Tuesday, his first day before the committee, Ehrlichman took an aggressive course, admitting neither illegality nor error on his part and apologizing for nothing. This tactic placed him in sharp contrast to many previous Watergate witnesses, who have conceded mistakes ranging from actual crimes to errors of judgment.

Ehrlichman's testimony yesterday also contradicted that of certain other witnesses concerning his own role in several different events.

For example, he flatly denied the previous assertion by John Dean that Ehrlichman told him to "deep six"—sink in the Potomac—papers found in Hunt's safe after the arrests of the Watergate burglars.

He has also denied telling Nixon fundraiser Herbert W. Kalmbach that it was legal and proper to raise and distribute clandestinely hundreds of thousands of dollars in cash for the defendants in the Watergate case. Kalmbach had told the Senate committee that Ehrlichman approved the project.

Ehrlichman has steadfastly maintained that he was surprised to hear of the burglary of Dr. Lewis Fielding's office because, he said, he had only authorized a "covert operation" to learn of Ellsberg's psychiatric records—and not a break-in by Hunt and Liddy.

He is also in conflict with Dean on the question of executive clemency, which Dean said was offered to convicted Watergate conspirator James McCord in an effort to guarantee his silence. Ehrlichman said it was never offered, though the subject was discussed in the White House as "a potential danger" to avoid.

It came up, Ehrlichman testified, when former White House special counsel Charles Colson received a letter

from Hunt early in January of this year. Hunt, a friend of Colson's, wrote "a very melancholy and very passionate kind of letter" in which he suggested he had been "abandoned by his friend," Ehrlichman said.

Colson wanted to "register his continuing friendship" to Hunt, Ehrlichman said, and, at a meeting in the White House to discuss the politically sensitive question, "clemency was obviously at the forefront of everybody's mind . . . as one of the things which was a potential danger."

Ehrlichman said he reminded Colson of a conversation he had had with the President on the same subject in July, 1972, in which Mr. Nixon told him he "wanted no one in the White House to get into this whole area of clemency with anyone involved in this case, and surely not to make any assurances to anyone."

He recalled that "there had been a lot of suspicion that somehow Mr. Colson might be implicated in the Watergate because he was a friend of Mr. Hunt's, and Mr. Colson had been leaning over backwards" to avoid that.

Ehrlichman said he was "totally nonplussed" when acting FBI director Gray told him last April that he had destroyed some politically sensitive material taken from Hunt's safe and given him for safekeeping by the White House staff.

The material—the same papers Dean said Ehrlichman told him to "deep six"—included copies of State Department cables forged by Hunt to implicate the late President John F. Kennedy in the 1963 assassination of President Ngo Dinh Diem of South Vietnam.

Ehrlichman said the documents were given to Gray personally rather than to the FBI agents investigating the Watergate affair because the White House had a low regard for FBI security against leaks to newsmen. "If these documents were simply wholesaled to the Washington field office of the FBI, we would be reading about it in Time maga-

zine in very short order," he recalled.

(Actually, that was very nearly the original intent of the making of the forged cables. Hunt has testified he tried to leak them to former Life reporter William Lambert, who dropped the story when he was unable to confirm it.)

When he spoke with Gray by telephone last April about the documents, Ehrlichman said, he told him that the President and the Attorney General (then Richard Kleindienst) knew they had been given to Gray for safekeeping, and that Dean had told federal prosecutors the same thing.

"Well, he can't say that," Ehrlichman quoted Gray as saying. He reconstructed the rest of the conversation this way:

"I said, 'Well, he did say that,' and he said 'If he says that, I will deny it,' and I said 'Well, Pat, it isn't a subject for denial. Obviously it's not something you can deny, I remember the whole episode very clearly.'"

Then Gray told him, Ehrlichman recalled, "You have got to back me up on this." Gray also said he had destroyed the documents, Ehrlichman told the committee.

Ehrlichman said he hung up, discussed the matter with the President, and called Gray back to say he could not support him in any denial that he had been given the documents. Gray told him he understood, Ehrlichman said.

Although Ehrlichman was able to provide the committee with what seemed to be a rather precise account of this conversation with Gray, at other points Ehrlichman professed to have only a hazy recollection of conversations in which he participated.

During the June, 1972, meeting when Dean and Ehrlichman turned the documents over to Gray, Ehrlichman provided only a sketchy account of what happened. He quoted Dean as saying "Pat, I would like to give you these."

At another point, Ehrlichman said he was not aware that Watergate conspirator G. Gordon Liddy had been involved in taking ITT lobbyist Dita Beard to Denver in 1972 until the subject came up at the hearings.

Inouye recalled to Ehrlichman that former Attorney General John N. Mitchell said he had discussed the Dita Beard incident with Ehrlichman, along with the Ellsberg episode and other "White House horrors."

"I do not believe that I have ever discussed that Dita Beard business or Hunt and Liddy with Mr. Mitchell," Ehrlichman said. "I think Mr. Mitchell's recollection on this general subject may be a little hazy."

At one point yesterday, Sen. Daniel K. Inouye (D-Hawaii) noted that President Nixon apparently does not intend to release tape recordings of White House meetings sought by the committee, and remarked, "I have heard legal scholars suggest that this fact could serve as a defense for persons who may be indicted for certain criminal activities which may have involved the White House."

He said he thought it could be argued "that the tapes include indispensable evidence to prove innocence, and this would be sufficient for defense to move for dismissal of an indictment. What are your thoughts, sir?"

This exchange with Ehrlichman then followed:

Ehrlichman: . . . I have been on the other side of the problem where I was sitting by the President trying to approach a problem which involved the rights of individuals and also the interest of the country, and frequently they do not coincide.

Inouye: My question is . . . if the United States prosecutor should decide to indict you for some crime could you use this as a defense and have the case dismissed?

Ehrlichman: It has never occurred to me, senator, and I would not touch the question with a 10-foot pole, frankly, for fear I might somehow affect my rights or someone else's rights.

Ehrlichman said he had never discussed with anyone the raising of such a defense.

The hearings continue today as Ehrlichman resumes his testimony at 10 a.m.