The Verdict on Ehrlichman

He was probably the most powerful public man ever to face criminal charges in the United States—once the nation's chief of domestic affairs, intimate confidant of Richard Nixon, a man whose jut-jawed scowl struck naked terror. Now he stood accused with three Watergate burglars—G. Gordon Liddy, Bernard L. Barker and Eugenio Martinez—in the bungled burglary of the office of Daniel Ellsberg's onetime psychiatrist, and John D. Ehrlichman seemed almost nakedly vulnerable. After an unexpectedly swift twelve-day trial, Federal Judge Gerhard Gesell all but instructed the jury to find Ehrlichman guilty—"There is no coherent statement of his defense," Gesell said later—and the jury took only three and a half hours to comply. Ehrlichman, the panel decided, was guilty on one count of conspiracy and three counts of perjury.

"We have been concerned from the very beginning about our ability to secure a fair trial in this district," Ehrlichman said as he left court. He had already told his lawyers to start preparing an appeal, he said, and he felt sure of winning "eventual complete exoneration." But for the moment at least, Ehrlichman and his three co-defendants faced an uphill battle for reversal—and he could be jailed for as long as 25 years and fined $40,000.

DRAMA IN THE WINGS

The highlight of the trial was to have been the testimony of Secretary of State Henry Kissinger and—in absentia—of Richard Nixon, whose answers to the written interrogatories of his former aide marked the third or fourth time that a U.S. President has testified in a criminal trial—and the first time that Mr. Nixon himself has participated in a Watergate trial. But the main drama of the trial took place offstage, when two prisoners in the courthouse basement took seven hostages at gunpoint and began bargaining to swap them for their own release; the trial had to be moved to another building, but at the weekend authorities managed to smuggle in a key to the hostages and they escaped unharmed.

At the trial, the star witness was clearly Ehrlichman himself. Alternately jovial and argumentative, he played to the watchful jury, derided the prosecution, reproved his own counsel and even corrected the judge. But his memory, as associate special prosecutor William H. Merrill charged, was "selective," and his defense was largely an assault on the credibility of government witnesses.

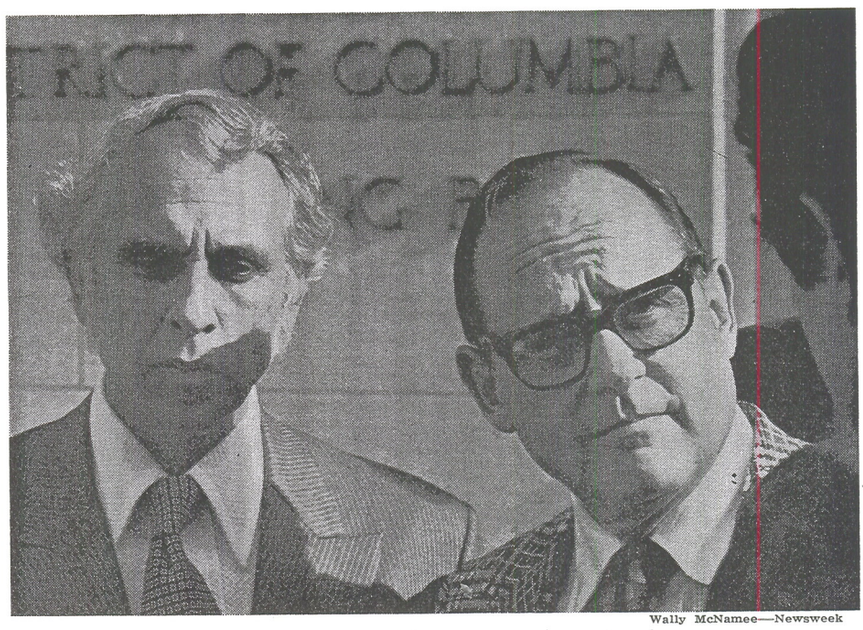
It was a remarkably restrained Ehrlichman who settled into the witness seat; one courtroom observer, remembering his arrogance before the Senate Watergate committee last summer, wondered if Ehrlichman "had had his eyebrows tied down." And under vague questioning, Ehrlichman reminisced about his importance at the White House, recalled the rivalry of plumber chiefs—and prosecution witnesses—Egil Krogh and David Young, and genially digressed for two hours before Judge Gesell recessed the jury and rebuked his associate counsel, Henry Jones.

"The jury is sitting there interested in the break-in," Gesell said. "Why not let this man tell what's on his heart and mind—and then turn him over to Mr. Merrill for cross-examination?" When the jury returned, Jones promptly ran Ehrlichman through one minute of rapid-fire questions—had he approved the break-in? had he seen the plans?—and got the predicted denials, then turned his client over to Merrill.

Merrill zeroed in on the Aug. 11, 1971, memo in which Krogh and Young had suggested a "covert operation" to examine Ellsberg's psychiatrist's files: Ehrlichman had initialed his approval, with the caveat that the operation not be traceable to the White House. "I was approving a legal, conventional investigation," Ehrlichman insisted. The method of the operation, he maintained, "didn't really enter my thought processes"; if he considered it at all, he supposed that the files might be examined on request or "by some third party." The caveat was there, he explained, because this "could become a *cause célèbre* in the press—a kind of 'Big Brother Is Watching You'," and it might appear that "the President had his own sleuths out." Gesell interrupted dryly: "Well, he did, didn't he?"

When he learned of the break-in, Ehrlichman went on, he decided not to report it to the police because it would have blown open "a very serious national-security investigation under way." Over the next two years, he said, he had forgotten the specifics of the Ellsberg case; thus he had mistakenly—but not, he maintained, perjuriously—told the first Watergate grand jury that he knew nothing about a psychological profile of Ellsberg or about Ellsberg-related files in Young's custody. How, Merrill wondered, could Ehrlichman have forgotten such seemingly significant information? Ehrlichman explained that he had trained himself to forget certain matters so as "not to pack around in my memory a great mass of stuff. Otherwise, I'd be packing around too much surplusage and then you could not function."

As the cross-examination wore on, Ehrlichman increasingly reverted to last summer's arrogance—despite anguished looks from his wife, Jeanne, and nervous signs from his chief counsel, William Frates. Ehrlichman reiterated that he couldn't remember, "quibbled" (his own word) with the form of Merrill's questions or chuckled at them. When Merrill suggested that Ehrlichman had some of Young's files on a certain date, Ehrlichman said "Anything is possible. Was there an elephant in my office? I don't recall seeing an elephant in my office." "No one has testified about an elephant," Merrill said quietly.



Wally McNamee—Newsweek

'Two little men from Miami': Martinez (left), Barker leaving court

WORDS FROM THE WHITE HOUSE

After Ehrlichman, the celebrity witnesses proved anticlimatic. Kissinger arrived in a flurry of limousines and Secret Service men, fresh from a White House briefing on his latest summit tour, and was greeted by a crowd of 200 gathered outside the courthouse. But his testimony inside took less than two minutes and

30 words, in which the Secretary of State rebutted some government testimony and denied having authorized Young to ask the CIA for a psychological profile of Ellsberg. The President's deposition, read aloud by Judge Gesell, offered nothing new, but Mr. Nixon did recall telling Ehrlichman that the plumbers operation "was a highly classified matter which could be discussed with others only on an absolutely 'need to know' basis"—thus lending an air of legitimacy to Ehrlichman's failure to report the break-in.

The other defendants, following Ehrlichman, claimed concern for national security as a defense for the break-in. Barker testified that he had been told that the burglary involved "a traitor to this country who was passing material to the Soviet Embassy," and Liddy's lawyer said he had thought it was all legal. In summation, Frates attacked the motives, credibility and character of the prosecution witnesses, and the Cubans' lawyer, Daniel Schultz, made an unexpectedly impassioned plea for "two little men down in Miami," patriots who "marched to a different drummer." For the prosecution, Merrill methodically reviewed the evidence and added his own touch of eloquence. "In this country we must all march to the drum of the Constitution," he told the jurors. "There are no exceptions."

And in his charge to the jury, Judge Gesell underscored Merrill's point. Patriotism or loyalty, he said, could not justify joining a criminal conspiracy, and it didn't matter whether the defendants had consciously planned a burglary as long as they intended to invade the privacy of Ellsberg's doctor by entering his office without permission. When Ehrlichman's lawyers objected that he had failed to explain their theory of the defense, the judge retorted angrily that there was no such theory. "He says he didn't authorize it, but he did, but he forgot he did authorize it," Gesell said sarcastically. "You didn't get it across to the court."

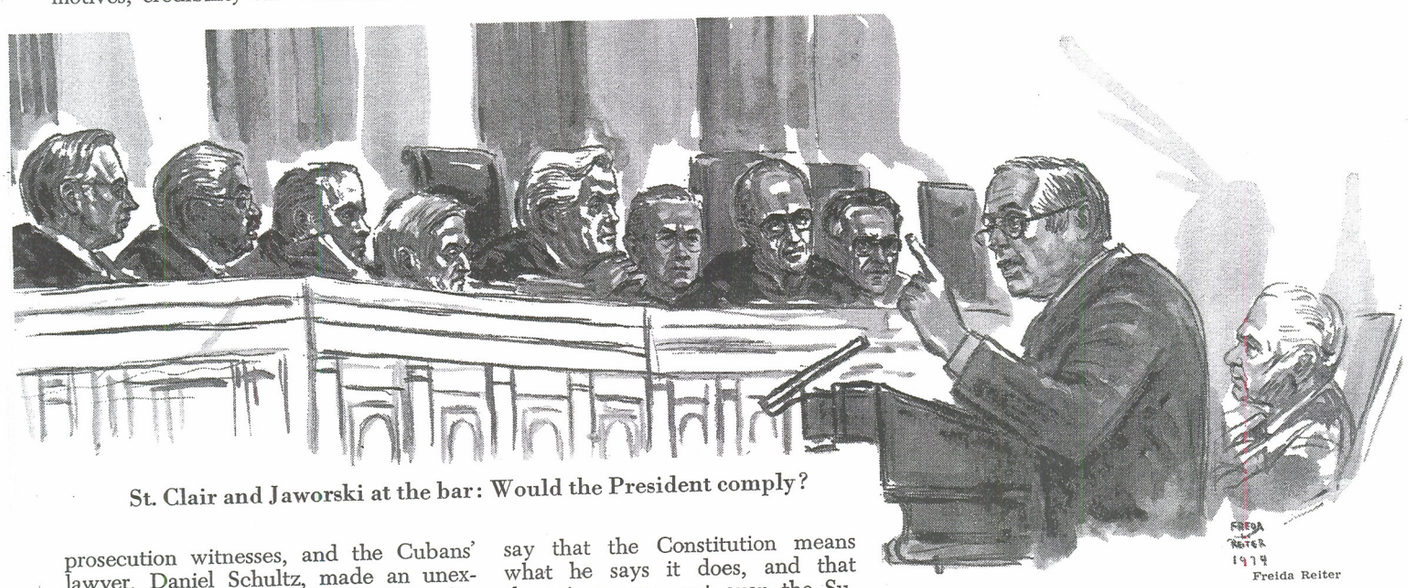
The Court's Hard Questions

For two days, they had been arriving like pilgrims at the marble plaza of the Supreme Court Building, toting sleeping bags and knapsacks filled with sandwiches. When the great bronze doors were finally opened last week, 136 sleepy-eyed visitors were ushered into the awesome pillared courtroom, along with 260 reporters, VIP's and special guests who had managed to wangle the hottest ticket in town. Then the eight black-robed Justices settled into their leather chairs and Watergate special prosecutor Leon Jaworski explained, with understated drama, why they were all there: "Now, the President may be right in how he reads the Constitution. But he may also be wrong . . . In our view, this nation's constitutional form of government is in serious jeopardy if the President, any President, is to say that the Constitution means what he says it does, and that there is no one, not even the Supreme Court, to tell him otherwise."

It was one of those Supreme Court confrontations that have shaped the nation's history. At stake in the first of the two cases being argued was whether President Nixon would be ordered to produce tapes of 64 White House conversations as possible evidence in the Watergate cover-up trial—or whether he could legally refuse on grounds of Executive privilege. The second was to test whether the Watergate grand jury had the right to name Mr. Nixon as an unindicted co-conspirator in the cover-up. And ultimately, as Jaworski noted, the fight was over an unprecedented issue: Who has the right to define the President's constitutional powers and duties—himself or the Supreme Court?

Before the Court convened, the laws and precedents had been meticulously argued in nearly 500 pages of written briefs, which the Justices had clearly studied carefully—and their first questions seemed to bode no good for Mr. Nixon's case. It was the President who had challenged the grand jury's right to name him an unindicted co-conspirator, but now several Justices made clear that the question was inconsequential compared with the more basic issue of whether he had to deliver the tapes. "You would be here, Mr. Jaworski," said Justice Potter Stewart, "whether or not the President had been named as an unindicted co-conspirator. That simply gives you another string to your bow—isn't that about it?" Nobody took exception—and since the Court almost never decides any question it does not have to decide, that one seemed likely to go unanswered.

And when Presidential counsel James D. St. Clair began arguing his first case before the Supreme Court, he came under immediate fire on a question that the Justices took seriously indeed: was the President submitting his case to the Court come what may, or would he—as his aides have repeatedly hinted—feel free to ignore an adverse ruling? "You are . . . leaving it up to this Court to decide?" inquired Justice Thurgood Marshall. "Yes, in a sense," replied St. Clair. "In what sense?" asked Marshall. "In the sense," said St. Clair, "that this Court has the obligation to determine the law. The President also has an obligation to carry out *his* constitutional duties."



St. Clair and Jaworski at the bar: Would the President comply?

Freida Reiter

Crux: Indeed, the burden of St. Clair's 89-minute argument seemed precisely that the courts had no right to give orders to the President. These cases, he argued, were "inexorably" tied to the impeachment investigation—and only the House of Representatives was constitutionally permitted to deal with that.

And if the case were decided against the President, St. Clair maintained, the nation's constitutional structure would be

endangered. "... A decision ... against the President would tend to diminish the democratic process," he said. "... Richard Nixon [would be], let's say, an 85 per cent President, not a 100 per cent President. And that can't be, constitutionally."

St. Clair also challenged the special prosecutor's right to sue Mr. Nixon. "The executive power of the government," he said, "... is vested in one man and that man is the President ... And the Attorney General is nothing but a surrogate for the President." "Your argument is a very good one as a matter of political science," said Justice Stewart, "... except hasn't your client dealt himself out of that argument by ... creation of the special prosecutor?" Replied St. Clair: "The President did not delegate to the special prosecutor the right to tell him whether or not his confidential communications should be made available as evidence."

But that brought up the whole hazy issue of Executive privilege, a Presidential right mentioned nowhere in the Constitution. St. Clair argued that all of Mr. Nixon's Watergate conversations would be privileged, to protect the public interest by preserving candor in discussions between the President and his closest aides. Leaning forward slightly, Justice Lewis Powell asked in a quiet voice, "What public interest is there in preserving secrecy with respect to a criminal conspiracy?" St. Clair's only reply was that no criminal conspiracy had yet been proven.

Circle: Would the conversation be privileged, Justice Marshall queried, "if an about-to-be-appointed judge was making a deal with the President for money?" Yes, said St. Clair: "The remedy is he should be impeached." "How are you going to impeach him if you don't know about it?" asked Marshall. Demonstrating the circularity of St. Clair's argument, he observed: "If you know the President is doing something wrong, you can impeach him, but the only way you can find out is this way; you can't impeach him so you don't impeach him. You lose me some place along there," he concluded. There were snickers in the courtroom.

Both St. Clair and Jaworski found themselves frequently pinned uncomfortably by the Justices' piercing questions. Both are noted trial lawyers, but oral advocacy is a special art. And it was left to Jaworski's assistant, Philip Lacovara, arguing the rebuttal for the special prosecutor, to demonstrate it. A 30-year-old father of seven and a former Republican campaign worker, Lacovara was cool and precise; he even managed to convey passion without changing the pitch of his voice.

Lacovara argued firmly—without interruption—that the President must be forced to surrender the tapes, no matter what the political consequences. But to concede that there might be political reverberations, he said, "does not mean that this is a political question ... Perhaps the finest chapters in the Court's recent history ... have come in the fields of reapportionment, civil rights and the ... rights of the criminally accused. It would be naïve to say that those were not profoundly, politically important decisions. But ... the Court understood its duty to interpret the Constitution."

"That's all we ask for today," Lacovara concluded, "and we submit that this Court should fully, explicitly, and decisively" —he paused for effect—"*definitively* uphold Judge Sirica's decision."

As usual, the oral argument ended abruptly and a trifle anticlimactically. But next day, promptly at 9:30 a.m., the eight sitting Justices (Justice William Rehnquist withdrew because of his close connection with Watergate defendant John Mitchell) gathered in the conference room adjoining the Chief Justice's chambers for their first discussion of the cases. NEWSWEEK's sources said the emerging consensus promised to become either a 6-2 verdict against the President or a unanimous ruling designed to make it harder for Mr. Nixon to ignore. The decision was expected this week.

UPI

Chaos in Baltimore: Looters at work during the police strike

CITIES:

The Dump

It was a city under siege. Sprawling heaps of garbage sent a sickening stench into the humid midsummer air; the city's jails and schools were undermanned; the public-health officer warned of an outbreak of bubonic plague; the streets were safe only for muggers, looters and the ever-burgeoning population of rats. And for the crisis-weary residents of Baltimore, there was no end in sight last week.

A strike by some of the city's sanitationmen started it all three weeks ago, after Mayor William D. Schaefer declared wage negotiations had reached the bottom line. The city had offered a wage increase of 5.5 per cent, but it wasn't enough—and last week the garbage was piled everywhere. The city coped for a while: a volunteer squad of several hundred white-collar trash men supplemented private haulers, and the remaining heaps were sprayed with chlorine to keep the smell down and the rats away. But in last week's soaring temperatures, tempers also ran high, radical unionists spoke of "shutting down the whole goddamn city to get our demands," and a protest rally at city hall triggered twelve arrests by policemen with nightsticks flailing.

The next night, police themselves went on strike for higher pay. Even though about half the force remained on duty, looting and vandalism broke out all over the city, police radio bands were jammed by calls, one suspected looter was killed by a non-striking policeman, and state police had to be called in to quell an outbreak of racial violence. Jail guards, city zoo keepers and the schools' janitors were refusing to cross the growing number of picket lines—and, to top it all off, a pall of sooty smoke from fires in the accumulated garbage hung over the city.

Both the sanitationmen and policemen were under court order to return to work —but at the weekend both remained in defiance of the order. "This city will go crazy," said one East Baltimore woman. "It's just about crazy now."