The Plumbers' Trial:
A Problem of Surplusage by James Boyd

On the first day of the White House Plumbers' trial, as the prosecutor and the defense lawyers made their opening presentations, it became clear that the questions to be answered were the same ones concerned in the pending Watergate cover-up trial of the Nixon high command and the Presidential impeachment process itself. How actively must a high executive participate to be culpable? How privileged are governors to violate laws binding upon ordinary people? How penetrable are the claims of subordinates that they were merely following orders, or the claims of superiors that they were too busy and too encapsulated to know what subordinates were doing in their names?

Artists and writers were there, some with no fast-approaching deadlines. For in the rooms assigned to defendants and witnesses, ghosts of the Nixon administration had begun to reassemble—Ehrlichman and Colson, Krogh and Young, Hunt and Liddy. In this unsparing light of inquest, there were characters to reread and faces to restudy. We had seen most of them in other settings, in the vaulting pursuit of power and in the pride of its possession; now, in the extremity of condign judgment on its exercise, they would show the final face of their regime.

To the accused who is ushered into Courtroom Number Six, the very look of the place must have a chilling effect, a physical confirmation of those queasy presentiments that have disturbed his nights ever since he first heard the calls of federal investigators. On the opening day of trial, the defendants sat in their assigned places and looked about. Above them towered a judicial rostrum of intimidating height, backed by a wide panel of black marble that ascended to the lofty ceiling as if to signify the chasm that already separated them from society. Across from them, rising in three tiers, loomed the jury box, from which the arbiters of their fate would shortly be peering down. And between them and the jury were the chairs and tables of the prosecution, the tables piled with ominous stacks of documents in which the defendants' offenses were no doubt duly recorded, the chairs occupied by four single-minded men who had for months been pursuing them. Intermittently, one or another of the prosecutors would dart out through a side door that connected the prosecution to the vast accusatory apparatus of the United States, shortly to reenter with yet another incriminating shred.

And so they sat and waited and tried to look innocent. Ehrlichman is a great buffalo of a man, very tall and broad, topped by a massive, balding dome that so dominates his other features as to give his face a cone effect. When he is in cogitation, the corners of his mouth depress, and penetrating eyes betray a skeptical, no-nonsense interior that must have been rather terrifying to ill-prepared subordinates in the days when he stood second from the Crown. He has been told that he must somehow democratize himself and try to appear less formidable, and he has prepared for it in his usual workmanlike manner. A deep tan, well set off by a wardrobe of various hues of

10/74
HARPER

blue, lends him an aspect that is casual, almost easygoing, yet substantial. He has new eyeglasses, with delicate rims and thin gold frames, that produce an effect of quiet dignity, almost benignity. During recesses he will affably receive autograph seekers and circulate among the press with dogged jocularity.

He is on guard against cameras that would take him unawares. Something unfair in the mix of his physiognomy makes him subject to the most disastrous photographs and so whenever he comes within camera range, as when he approaches the courthouse each morning, he smiles most determinedly and keeps smiling until he reaches the sanctuary of the courtroom, where he can relax somewhat into a look of grave but unmenacing earnestness. As the session wears on, his attentiveness sometimes wanes, and he appears to retreat inward—a powerful, somber mass within an almost visible circle of isolation.

To Ehrlichman's left sit Barker and Martinez, agreeable-looking men of sincere mien. That they broke into Dr. Fielding's office in search of Daniel Ellsberg's psychiatric file is not in dispute. Their defense can be based only on extenuating circumstances and will require the fullest enjoyment of the presumption of innocence that is said to be their right. But each of them has unreassuring memories of a previous prosecution and of a courtroom identical in appearance to this one. Two years before, they had been indicted for the Watergate break-in and were held in prison for several months before trial on the theory that they would abscond if they were not behind bars. That time they had been pressured into silence by men who represented the Presidency and who spoke to them through E. Howard Hunt. When they pled guilty, they had heard conditional sentences of forty-five years pronounced upon them by Judge John Sirica in an unveiled effort to break them and make them talk. Their Watergate conviction is now being appealed. They are out of prison but back in the federal courthouse.

Gordon Liddy sat apart from the other defendants, his back to the wall, his eyes darting about. He smiled frequently, and in general seemed perversely at ease. When the court was not in session, Liddy was confined in the basement cellblock of the courthouse, for he still has several years to serve of the sentence imposed on him by Judge Sirica for his part in the Watergate break-in, and he was also serving a contempt term for steadfast non-cooperation with the prosecutors.

Liddy has a history of being an avid player of the role of the moment. For two years his role has been that of the compleat prisoner. Since those quasi-charismatic appearances of his at the time of the original Watergate arrests, he has lost twenty or thirty pounds and has a shrunken look. Dark eyes glitter in a ghostly white face, and the once-debonair moustache now droops bushily over a face too thin for it. From the back, a bald spot is visible. He carries about him, and seems consciously to cultivate, a sort of Rudolf Hess mystique, that of the perpetual prisoner whose secrets shall go mute with him to the grave.

Yet he is a man of whimsy. Occasionally he will wink at a face he recognizes in the courtroom. At one of the pretrial sessions, he executed a military salute upon encountering Ehrlichman, which must have been disconcerting to that gentleman, who maintains that he was hardly aware of the Plumbers and certainly never gave them any orders. During the early days of the trial, Liddy scribbled

notes furiously on a yellow pad and passed them to his lawyer, Peter Maroulis, giving rise to the intriguing prospect that he contemplated a vigorous defense. But in fact he planned no active defense, would call no witnesses, and would decline to take the stand himself.

THE FIRST ACCUSER to take the stand was E. Howard Hunt. He is a pleasant-looking man, rather slight, pale, and mild mannered, almost subdued by catastrophic events. After seeing him nearly fade into his surroundings, it is difficult to think of Hunt as the author of so many men's woes, the instigator of so vast a trail of wreckage. Never again, no doubt, will a failed adventure novelist be let inside an administration.

On occasion, perhaps out of reflex habit, Hunt would sound a grandiose note, as when he was asked what kind of work he did for the CIA.

"Oh," he answered airily, "subversion of prominent figures abroad, the overthrow of governments, that sort of thing."

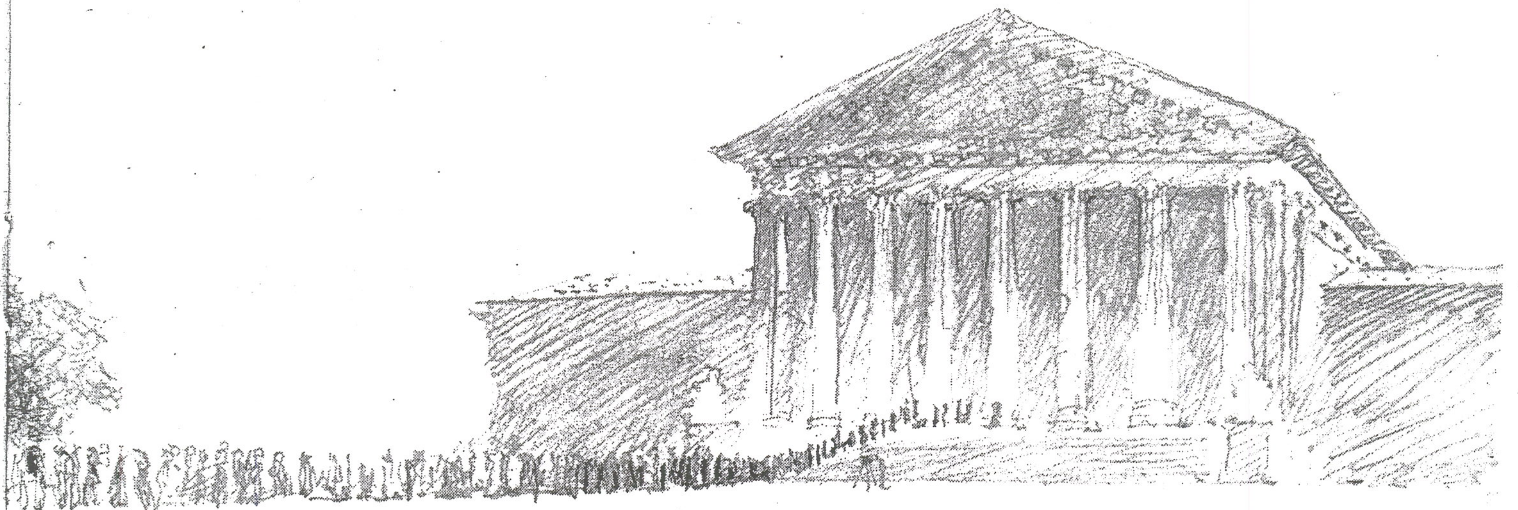
Hunt's scope was now much reduced. His role in Prosecutor William Merrill's scheme of things was to convict his old comrades—Liddy, Barker, and Martinez—and he coolly performed this latest mission.

Step by step, he described how Liddy had embraced the idea of a "covert entry" into Dr. Fielding's office and had vied for permission to do the job himself; how Liddy was present when David Young enlisted CIA help to "publicly destroy Ellsberg" and render him "an object of pity"; how Liddy had accompanied Hunt to California on a "vulnerability and feasibility study" of Dr. Fielding's office, and how Liddy had slipped into the office and taken pictures with a CIA camera that looked like a tobacco pouch; how Liddy helped Hunt prepare the "final entry proposal" and its budget and made a pictorial presentation of it to Krogh and Young; how Liddy had gone with Hunt to Chicago to buy equipment for the entry; how Liddy had accompanied the "entry team" to Fielding's empty office on Labor Day, 1971; how, when the initial door-opening plan failed, Liddy had given the order to break it in with a crowbar; and how, when nothing on Ellsberg was found in Dr. Fielding's office, Liddy had unabashedly joined Hunt on recommending a burglary attempt on Fielding's apartment.

Hunt's testimony about Barker and Martinez also contained just the proper detail to establish a premeditated crime. He had personally recruited them, he testified, for a "surreptitious entry." On the night before the entry, Hunt had taken them to the scene of Dr. Fielding's office, walked them around the neighborhood, and told them they were to examine his files. And on the next day, to Hunt's certain knowledge, they did break in and examine the files.

There was no bias or malice in Hunt's testimony; his task of self-preservation required only that he tell the truth, and his admissions endangered him only if they were *not* the truth. He was thus as happy to cooperate with the defense as with the prosecution. Under skillful cross-examination by Daniel Schultz, the youthful counsel for Barker and Martinez, he gave testimony that caused a ripple of sympathy throughout the courtroom for the Miami men.

When the need arose for operatives who could not be traced to the White House, Hunt had counted on Barker's old allegiance to him dating from the late 1950s, when



Hunt was the celebrated "Eduardo," the CIA coordinator of the Bay of Pigs operation, and Barker was his lieutenant, "Macho."

After an absence of ten years, Hunt dramatically reappeared in the Cuban community of Miami; he told Barker that his help was needed against an unnamed enemy of the United States who was a "definite traitor, a passer of national security information to the Soviet Union, and a possible Soviet spy." Hunt was in the White House now, he said, where he could advance the Cuban cause. He represented a new agency, he told Barker, a "superstructure that included the CIA and the FBI, but was over both." Barker agreed to serve and to recruit other Cuban-Americans who would do what was asked of them without pay, as an act of patriotism. Following the tradition of the many CIA operations they had been involved in, Barker and Martinez asked no questions. They were not told the name of their target until ten minutes before the entry, and the name, Daniel Ellsberg, meant nothing to them when they did hear it.

Merrill had reason to be pleased with Hunt's testimony; it seemed to have buried the minor defendants irretrievably; now he could concentrate on the main target.

THE PROSECUTION HAD DESIGNED this entire case so as to reach the unreachable star. The charge against the defendants—conspiracy to deprive Dr. Fielding of his civil rights under the Fourth Amendment by illegally searching his files—had been drawn to cast a net large enough to ensnare Ehrlichman. Four other counts against Ehrlichman alone—for lying to the FBI and the grand jury as to his involvement and knowledge concerning the Fielding operation—served as backstops should he elude the main charge.

The four conspirators whom Merrill had either excused altogether from prosecution or had accommodated in plea bargainings had been spared so they might help him nail Ehrlichman. The lesser defendants, who could have been pursued on other charges, in other proceedings, were here essentially as props to enhance the larger purpose.

There was a hazard in Merrill's strategy. By ranging alongside Ehrlichman two deceived dupes for whom a natural sympathy was inevitable, while excusing those who deceived and set them up, he risked an emotional revolt by the jury that might vitiate his entire case. And by sparing those at the middle and upper-middle levels who had beyond doubt directed and supervised the crime, in order to get their testimony against the remote one whose guilt was difficult of demonstration, he might lose the lot, suffering the catastrophe that had befallen the New York prosecution of Mitchell and Stans and casting a cloud over the entire combined strategy of the Watergate prosecutions.

Yet the worthy prosecutor must go for the top man. In his evidence books, Merrill had it all down in testimony and documents—the acts and culpable knowledge of Ehrlichman that Young, Krogh, and Colson would testify to. On paper it made a convincing chronology:

August 5, 1971: Young and Krogh tell Ehrlichman that Dr. Fielding has Ellsberg's records but refuses to talk to the FBI; that the project needs these records; that Hunt and Liddy have the ability to go in and get them in a covert operation, and want permission to do so. Ehrlichman says they all ought to think about it further and expresses concern that it not be traceable.

August 11: Young and Krogh write to Ehrlichman: "We would recommend that covert operation be undertaken to examine all the medical files still held by Ellsberg's psychoanalyst." Ehrlichman initials his approval, and then adds in handwriting, "If done under your assurance that it is not traceable."

August 23: Young and Krogh discuss with Ehrlichman raising money for "Hunt/Liddy Project #1."

August 25: Ehrlichman is informed by memo that "Hunt and Liddy have left for California."

August 26: To obtain Colson's help, Young and Krogh write Ehrlichman: "We have already started on a negative press image for Ellsberg. If the present Hunt/Liddy Project #1 is successful, it will be absolutely essential to have an overall game plan developed for its use."

August 27: Ehrlichman writes to Colson: "On the assumption that the proposed undertaking by Hunt and Liddy would be carried out, and would be successful, I would appreciate receiving from you, by next Wednesday, a game plan as to how and when you believe the materials should be used."

August 30: Young and Krogh phone Ehrlichman on Cape Cod to report that Hunt and Liddy have returned from their preliminary check and that everything looks favorable. Ehrlichman asks each of them in turn: "Do you still recommend it?" Each responds, "Yes." Ehrlichman says, "Okay, let me know if they find anything."

August 30 or 31: Ehrlichman phones Colson, the White House fundraiser for nontraceable projects, and asks him, without telling why, to raise $5,000 in cash and get it to Krogh.

The facts were there, Merrill was satisfied, as he prepared to bring on his key witnesses—Young, Krogh, and Colson. But a trial is more than an evidence book. Would the witnesses stand up?

It is the task of defense lawyers to take up such sows' ears and transform them, if not into silk purses, at least into unidentifiable objects. The loophole each lawyer saw for his client was that of intent. Barker and Martinez, it could be contended, had not intended to commit a criminal burglary; they thought they were performing a lawful government operation, under White House authority. Certainly they knew it was not proper, by ordinary standards, to break into a doctor's office with crowbar and glass cutters; but in the past they had been directed by the CIA to perform similar acts, for which they had been honored, not punished. Might they not have inferred from this that there is a dispensating authority somewhere that rules such acts legitimate?

An "intent" defense by Ehrlichman was more complicated, but to his lawyer, William Frates, endowed with multiple opportunities. Ehrlichman was simply unaware of the follies his unwatched subordinates were planning. He had not intended to authorize an entry of any kind; he had not understood, because of semantic confusions, that Krogh and Young contemplated that. He had not intended to make false statements to the grand jury and the FBI, but in the great press of his duties and the passage of years, he had simply forgotten the preliminaries to the Fielding break-in, and had no recollection of them at the time he testified. His only intent in all these matters, as he

toiled through his seventy-hour weeks, was to protect the national security of the United States and implement the instructions the President had given him.

LAWYERS FROM ALL SIDES thus propositioned the jury, seeking to implant either certitude or doubt; but there was another competitor for its allegiance. It was the duty of Judge Gerhard Gesell to see to it, if he could, that this case was decided on the evidence and the law and not derailed by the highly charged forces threatening to get loose in his courtroom—bias, sympathy, unwarranted inferences, awe of or animus against high office, curbstone notions of what constituted proof of guilt or extenuating circumstances.

"Good morning, ladies and gentlemen," the judge intoned to the jurors each morning, his great round face beaming down upon them as though they were marvelous children whose daily prodigies continually delighted him.

"Good morning, your Honor," the jurors chirped back in unison.

He would inquire as to the agreeability of the jurors' quarantined lodgings, preview the coming day's schedule, report on his efforts to have the courtroom air conditioning beefed up, apprise them of the little treats he had planned for them—a Fourth of July picnic, a weekend visiting period for relatives—and in other ways convey, within the limits of his autocratic manner, that they were very important people, partners with him in an arduous but exalted enterprise.

Even without the majestic setting and summary powers of his office, Gerhard A. Gesell would exert a dominating presence by virtue of the singularity of his person and the power of his mind. Broad-shouldered and well-fleshed within his black robes, he complements the great rostrum, fulfilling rather than diminishing its intended effect. Judicial white hair, care-lined brow, sombre eyes, rubicund complexion, and a mouth that somehow conveys full possession of the discriminating faculty—it is a visage that commands one's apprehensive attention.

When talking to his jurors or setting at ease a humble witness afflicted with the jitters, he can flash a suddenly incandescent charm; but his characteristic expression is that of one who constantly weighs and usually finds wanting. At his first entrance in the morning, his face has a rested, smooth, almost trim look, but as the hours of complicated testimony pass—which he must fully assimilate so that he may overrule a question today because of an answer made ten days ago—furrows appear and deepen, color rises, eyelids lower, folds invade the jowls and neck, and a certain shapelessness rubberizes his features. By four o'clock he resembles—to the erring prosecutor or defense counsel—a smoldering volcano on the verge of erupting.

But he does not erupt. His "sustained" and "overruled" come calmly and promptly, supported where necessary by an instant command of the law or the preceding testimony that is never challenged. Indignation with him seems not an indulgence but a lever to use most measuredly in raising the tone of his courtroom or lowering the temptations of lawyers to slip over rabbit punches or slide into unprofessional conduct. "This is the second time I have cautioned you, Mr. Frates. There will not be another," he will say in a fine, cultivated voice that penetrates without being raised. Or: "You cannot ask him what he understood, Mr. Merrill. Ask him what he heard." Or: "You have a bad habit, sir. You make your objection before the question has been asked. You must stop it."

The disciplining of lawyers and the sanitizing of testimony are only steps in a process. For this judge, the integrity of the law and of its fact-finding procedures is supreme. Once the government forces a defendant into his courtroom, it abandons its right to secrecy, the privilege of its leaders, the assumption of its grandeur. It is the defendant and the presumtion of his innocence that are now privileged.

Does Defendant Ehrlichman need access to his old papers to defend himself, and does the President refuse access? Then Ehrlichman shall be released, and the President shall be cited for obstruction of justice and contempt unless there is a compromise—which there was. Does Defendant Ehrlichman need the testimony of high officers—even the President and the Secretary of State? Then the President's testimony will be sought, either in person or in writing as the need warrants, and Secretary Kissinger "will be here, at 9:30 on Wednesday morning."

But Gesell's view of the integrity of the law cuts most grievously against the defendants, too. He has denied to Ehrlichman a defense based on the government's inherent powers in the national-security field because he recognizes no power that abrogates the law. And he has rejected notions advanced in behalf of all the defendants that good-faith obedience to trusted superiors in high office excused them from violations. Such orders, even if given by the President, were illegal, the judge says. And obedience to them was illegal.

After a day or two in Judge Gesell's courtroom, the idea sinks in. The rules and attitudes by which justice may be done are to be reverenced here. This is palpably felt. An audible jest by a spectator, or the bullying of a witness by a lawyer, or the "accidental" mention in front of the jury of that which has been forbidden, becomes unthinkable, not only because of the Jovian retribution that would surely follow but because the spirit of fairness has been exalted here and begins to enforce itself.

THE DIFFICULTY OF TRANSMITTING evidence from the prosecutor's files to the jurors' minds became manifest with the arrival on the witness stand of the pivotal witness for the prosecution. David Young, thirty-seven, had come to the plumbers via Cornell, Oxford University, a Wall Street law firm, and two years under Henry Kissinger. Among all the Watergate accomplices whose names litter the rolls of the indicted, the convicted, the imprisoned, and the disbarred, David Young shines iridescently as the genius of survival.

In the early phase of pretended White House openness and cooperation with various probes that were then still under control, when Young's fellows were testifying—and perjuring themselves—he accepted the advice of counsel that he make no pretense of honesty and instead adopt the

standard criminal defense tactics—to refuse to talk, take the Fifth, and demand complete immunity for squealing. He was the Watergate pioneer in this regard. Moreover, he had seen to it that, against the dark day to come, he would have something exciting to offer the prosecution.

In March 1973, just after Hunt's blackmail threat to expose "seamy" doings by Ehrlichman, Young was directed to bring to Ehrlichman the file on the Fielding operation. Divining Ehrlichman's intent, Young first made xerographic copies of the documents that incriminated Ehrlichman, then put the originals back in the file and delivered it to Ehrlichman. When the file came back a few days later, Young checked it and, sure enough, the incriminating memoes had vanished.

Young kept his copies, and when the time came for him to bargain with the United States for his freedom, he was able to offer: (1) the crucial documents; (2) evidence of "consciousness of guilt" by Ehrlichman, revealed in his removal of the documents; and (3) proof that Ehrlichman had fully refreshed himself on these matters only a few weeks before he denied any knowledge of them to the FBI and the grand jury. Thus it was that when Young took the stand to testify against his former collaborators he was completely in the clear—the only major architect of a Watergate crime to have eluded both federal indictment and professional disbarment.

Even at their ease, however, men of such deviousness often make the courtroom a Gethsemane for prosecutors. Young is a balding young man, mousy and unprepossessing, with a soft, toneless voice that has the effect of chloroform and trails off at the end of each sentence. On the stand, he displayed all the mannerisms of unreliability—fidgety hands, averted gaze, blinky eyes, a face that crinkled as if wrenched by uncertainty. Such was the caution of the man and the complexity of his mind, which seemed to see multiple alternatives in the simplest question, that he was for the most part unable to give a clear, direct answer. It was his habit to preface all key answers with the qualifier, "I think." When asked to identify a document he had authored, he would say, "I must have dictated this. It has my name on it. But I don't remember it." When asked what he or someone else had said at the meetings on Merrill's chronological list, he would frequently attempt to give his impression of what the speaker meant; answer after answer became entangled by objections from Frates, most of which were sustained. At no point during several hours of testimony did Young specifically link Ehrlichman to the approval of an illegal burglary.

This supported Frates's defense strategy, which was based upon Ehrlichman's faulty memory and on semantic ambiguities. If it could be established that "covert operation"—the euphemism of the Plumbers' memo writing—meant to Ehrlichman nothing more than "an operation not to be publicly announced," if the jury could be persuaded that, to be guilty, Ehrlichman had to have explicitly approved a "break-in" by name or at least an unauthorized entry, then all the evidence in Merrill's book would not convict him. In less structured deliberations than a trial, men might automatically assume that if Dr. Fielding had the Ellsberg files locked up in his office and had refused to make them available to the law, then there was no way to get hold of them other than illegal entry, no matter what executive types called it. But juries are not free to form such inferences, and Frates now moved in to nail down these distinctions.

With his forceful, rapid-fire, Judd-for-the-defense technique, Frates was better than Merrill at extracting direct, if circumscribed, answers from Young.

Q. You did not consider the word "covert" to mean illegal, did you?
A. That is correct. . . .
Q. Did you authorize a break-in at Dr. Fielding's office?
A. I recommended a covert operation to examine files held by the psychiatrist.
Q. Answer my question! Did you authorize a break-in at Dr. Fielding's office?
A. I did not authorize it.
Q. Did you ever discuss a break-in at Dr. Fielding's office with John Ehrlichman, prior to the break-in?
A. Using the word "break-in," we didn't discuss it.

When Young left the stand, to slip out of the U.S. Courthouse unobtrusively, the case against Ehrlichman seemed to be foundering.

Merrill patiently gathered up his papers; just as he did not believe in gimmicks or stridency in eliciting testimony, so, too, he did not despair over a bad day in a hopeful case. Through Young, he had at least gotten introduced as evidence documents that would later speak to the jurors for themselves. And better witnesses would follow to corroborate Young's wispy uncertainties.

EGIL KROGH IS THE PERFECT WITNESS. He is handsome, but of the square-jawed, straight-eyed kind that conveys honesty to a fault. He sits motionlessly, his hands folded calmly in front of him, eyes on his questioner, and answers promptly and emphatically in a strong, clear voice. Such is the impression of truth he gives that it could issue only from either the deepest sincerity or the most demonic guile.

When the Fielding indictments first came down, Krogh confessed his guilt, admitted he was wrong, and accepted the six-month prison term which he has by now completed serving. So he was not under the taint of betrayal or opportunism.

Merrill easily took Krogh through the devastated terrain Young had just left behind.

Q. What did "covert operation" mean?
A. To me at that point it was clear that an entry operation would be undertaken to examine those files.
Q. Did you authorize an entry, Mr. Krogh?
A. Yes.
Q. Did you believe you had the authorization?
A. I did.
Q. On what did you base that belief?
A. I based it on the discussions with Mr. Ehrlichman, I based it on the memorandum. . . .

Frates, with delicate care, questioned Krogh, first on the August 5 discussion, then on the August 30 phone call.

Q. Was the word "entry" used in that discussion?
A. I don't recall it being used.
Q. Was there any reference during the phone call to a break-in?
A. No, sir.

On redirect examination by Merrill, Krogh amplified: "I don't recall using the term 'entry.' However, we had used terms of 'operation,' 'effort,' and 'covert,' which embraced what later took place. . . . It was on an open telephone line. This was not something I wanted overheard by anyone. I was doing my best to convey to him that the conditions had been met that this would be nontraceable."

Krogh left little doubt but that all concerned knew exactly what they were talking about.

His testimony and his obvious sorrow at giving it were the more impressive because of the biographical sketch Merrill had previously elicited from him. From boyhood, his family had been close to Ehrlichman's. Since Krogh had been twelve years old, Ehrlichman had been his guide and benefactor, influencing him to attend law school, helping him finance it through part-time employment at Ehrlichman's law firm, giving him his first legal job, bringing him to Washington, pushing him up the ladder until, at age thirty-three, he had been the youngest undersecretary in the Nixon administration. In the upside-down world of post-Watergate, Krogh's tortured devotion was far more damaging to Ehrlichman than was Young's treachery.

"At the moment I am unemployed," said Charles Colson with a grin, on being asked his occupation. In four days he would begin a one-to-three-year prison term on the guilty plea that severed him from the Plumbers trial. Colson is the only folksy-looking member of the Nixon former high command, a combination of Wallace Beery and Mickey Rooney.

He used to be rough and tough, a phrasemaker of macabre realism ("When you have them by the balls, their hearts and minds will follow"), but now he is mellowed, sustained by the Holy Ghost. Here for a cameo appearance, he answers questions with a serene and resonant authority.

"Mr. Ehrlichman said that Mr. Krogh needed $5,000 and could I obtain it?" Which Colson did, in cash, from a lobbyist, who was paid back out of milk-fund donations.

"Just after the break-in, Ehrlichman told him to forget about the game plan he had asked him for, explaining, "Some of our boys tried to get the Ellsberg psychiatric records and they failed."

TO THOSE WHO REMEMBERED the Ehrlichman of the Ervin Committee hearings—the lion of truculence, the tiger of memory, who, by the fifth day, had begun to eat up the committee, inflicting wounds from which that inquiry never really recovered—the mild-mannered amnesiac who here appeared under his name made manifest the difference between the political arena and a court of law. Here, the half-truth, the withering riposte, the crowd-pleasing rejoinder could be a ticket to the penitentiary.

There had been a tip-off to his ailment when his counsel had asked the Court's permission to call as a defense witness a psychologist who was an expert on memory blackouts among executives, a request refused because the good doctor had never actually examined the defendant. So Ehrlichman had to proceed without expert ground-laying. He could not remember. That was his cursed problem. Too many memos crossed his desk. Too many calls crowded his multiple phone lines.

"I trained myself to forget . . . not to pack around in my memory a great mass of stuff. . . . Otherwise you'd be packing around too much surplusage, and then you could not function."

That was why he had paid so little attention to Young and Krogh, why he had misstated to the FBI and the grand jury. He could not remember.

Merrill quietly led him through ten meetings, memos, and phone calls during which aspects of the Fielding entry were discussed before it occurred; many he could not remember at all, try as he might; of others, he could remember aspects that did not pertain to the break-in. Merrill's chronology was beginning to serve him well—the scraps he had salvaged from Young's testimony, the chunks from Krogh's, the documents—he was tying it all together now. On a blown-up calendar, he drew circles around every date on which something important had happened that Ehrlichman could not remember. Four other participants, who were just as busy as Ehrlichman, could remember very well, Merrill reminded the jury.

"The way Mr. Ehrlichman's memory works is to remember only those things that are not harmful or those things that he is finally confronted with by written documents. . . . You remember he said, 'I have trained myself to forget things.' What he says he has forgotten are incriminating things. I am afraid he has trained himself to deceive."

Mr. Frates asked each juror to search his own deficiencies. He had prepared computations showing that in three years a million pieces of paper had crossed Ehrlichman's desk—252 feet of paper—and 10,000 phone calls. He was in full throat:

"It's easy for them to say, 'Remember everything'—out of 252 feet of paper—and say, 'If you don't, then you ought to be indicted.' "

Maybe Frates was reaching them. But the trouble was, John Ehrlichman does not make a very convincing dumbbell.

AUDITORS FAR BEYOND THE COURTROOM awaited Judge Gesell's final charge to the jury as to which defenses were valid and which spurious. Observers of the trial were sure that the jury would heed Judge Gesell, and so, as he shifted forward his great, black-robed bulk and began delivering his instruction, a vast and decisive power seemed immanent in him.

An individual cannot escape the criminal law simply because he sincerely but incorrectly believes that his acts are justified in the name of patriotism, or national security, or a need to create an unfavorable press image, or that his superiors had the authority without a warrant to suspend the Constitutional protections of the Fourth Amendment. . . .

If you find that a defendant through the course of dealings deliberately closed his eyes to what otherwise would have been obvious to him, with a conscious purpose to evade the likelihood of prosecution, this situation can be used by you as some evidence that the defendant had knowledge of the objectives of the conspiracy. . . .

You must have clearly in mind that the proper concern of the President of the United States and others in high office to prevent leaks of national security information would not have justified a warrantless search

of Dr. Fielding's office without his permission. There is no evidence that the President authorized such a search and, as a matter of law, neither he nor any official or any agency such as the FBI or the CIA had the authority to order it. . . .

After only three hours of deliberation, the jury notified Judge Gesell that it had reached a verdict. When the court reconvened, the foreman rose to read the verdict:

Ehrlichman: "guilty." Liddy: "guilty." Barker: "guilty." Martinez: "guilty." Ehlichman was also found guilty on three of the four perjury counts with which he was charged.

On hearing the news, Rep. Robert McClory, the second-ranking Republican on the impeachment tribunal, broke into tears. Acquittal would have immeasurably strengthened the President's prospects; conviction hung the black drapes of criminality on White House abuses of power.

ON JULY 31, 1974, the four convicted defendants appeared before Judge Gesell for sentencing. He first addressed Ehrlichman:

"You hold the major responsibility for this shameful episode in the history of our country. . . . After giving heavy weight to the many affirmative aspects of your life . . . you are sentenced to twenty months to five years."

To Liddy:

"You . . . had a middle level of responsibility in this case . . . but the evidence demonstrates your violation was deliberate and your offense is clear." Liddy was sentenced to one to three years. They would run concurrently with his previous sentences so as not to represent an increased period of imprisonment.

To Barker and Martinez:

"You have contributed to illegal activity which in many ways was typical of the very regime you each so strenuously and courageously opposed in Cuba. . . . As you both well know, it is impossible to preserve freedom anywhere when zealots take over and the rule of law is ignored." But, since they had been "duped by government officials," Gesell said and "had already been adequately punished," they were both given suspended sentences.

Outside the courthouse there is a stone tablet on which is inscribed: "No person . . . shall be deprived of life, liberty or property without due process of law."

During a few weeks of June and July, in the courtroom of Gerhard Gesell, due process was rendered with rigor, justice, and mercy; praised be its name. □

James Boyd is a writer from South Portland, Maine, now living in Etlan, Virginia.