

After Suspense of Investigation, Rules of the

MARCH 2, 1974

Courtroom Now Come Into Play

Both Sides Will Employ Time-Tested Strategies

By LESLEY OELSNER
Special to The New York Times

WASHINGTON, March 1 — For all the drama of the Watergate grand jury's announcement today, for all the day-by-day build-up of suspense, it is only an indictment. It will take months to turn the indictment into anything more—months of legal motions and jury selection and trial, months of battling in the courtroom.

And each side will spend those months following strategies tested over years in the courtroom—the prosecution attempting to try all the defendants in a single trial, attempting to get co-conspirators to testify against one another; the defense attempting to discredit the prosecution witnesses and making sure that the trial record provides grounds for an appeal, should the trial end in conviction.

There will be some less-than-commonplace elements in each side's strategy, for the case is undeniably unique. It is possible, for instance, that one or another of the defendants may try to subpoena the President and bring about, in the midst of the trial, a constitutional confrontation.

Rules of the Courtroom

But, essentially, what the indictment means, at least for the seven men named in it and the battery of lawyers who will defend them, is that the Watergate cover-up has turned from a national scandal into a plain criminal case.

The final outcome, like the outcome of thousands of other cases filed each year, will be determined in the end under the rules of the courtroom.

None of the lawyers involved was willing today to describe publicly the strategies now being worked out. But the indictment itself and the behavior of

the special Watergate prosecution to date indicate at least some prosecution strategy. From that strategy can be drawn some conclusions about the defendants' responses.

The indictment, for instance, charges all seven defendants with a single count of conspiracy, in addition to other charges against some of the seven. It is clear that the prosecution thus wants to try all seven defendants in a single proceeding—a tactic that benefits the prosecution in a number of ways.

"It enables you to circumvent the normal rules of hearsay," one prominent Washington lawyer, Daniel A. Rezneck, who is not connected with the case, pointed out today. Testimony that might not be admissible if a defendant was on trial by himself can sometimes be admitted if he is on trial with others.

This could happen in the following manner: A witness is willing to testify that he heard Mr. A make a certain statement. If Mr. B is on trial by himself, the witness's testimony might be barred as hearsay. But if Mr. B is on trial with Mr. A, the witness's statement might be admitted.

Also, evidence of acts committed by one defendant might not be admissible against a second defendant if the second

defendant was on trial by himself. If the two defendants were on trial together, charged with conspiracy, Mr. Rezneck said, the evidence regarding the acts of the first could be admitted.

The indictment hints at another prosecution strategy: to call co-conspirators as witnesses against the seven defendants.

In its discussion of the alleged crimes, the indictment mentions a number of persons in addition to the seven; some of those others, at least, were apparently implicated in the crimes but have not yet been indicted. The logical explanation for this, according to lawyers, is that the prosecution is trying to work out some kind of agreement with some of

these people whereby they would be allowed to plead guilty to minimal charges in return for their agreement to testify.

Mentioned in Indictment

The prosecution has already made such agreements with some former Administration and campaign aides, such as John W. Dean 3d.

Persons mentioned in the indictment but not charged with crimes include: Richard G. Kleindienst, the former Attorney General; Gen. Vernon A. Walters, deputy director of the C.I.A.; William O. Bittman, former attorney for E. Howard Hunt Jr., one of the Watergate burglars; Anthony Ulasewicz, an investigator who worked for the election campaign, and John C. Caulfield, another employee of the re-election campaign.

The fact that the prosecution's chief witnesses are confessed criminals—and the additional fact that most of them have had their sentencing deferred until after they give their testimony—is, however, one of the prosecution's chief problems in the case.

For the defendants' attorneys will be able to point out this fact to the jury. The legal terminology for this tactic is "impeaching the credibility" of the witness and, in the case of the cover-up, it is expected to be a major part of the defense of each of the seven men under indictment.

The prosecution will thus have to try to bolster its witnesses' credibility in any way possible. One technique is to introduce prior statements that a witness has given and that are consistent with his or her testimony at the trial.

Long before the trial begins, however, lawyers for the defendants are expected to make a number of moves designed to foil the prosecution.

At least some defendants are expected to ask that their cases be severed from the cases of their co-defendants—or, at least, that the charges that do not relate to them, such as a perjury count against

a co-defendant, be tried separately. The argument for such a motion could be that massive publicity about Defendant A might hurt the chances for acquittal of Defendant B, should they be tried together.



The New York Times/Marilyn Church

Walter J. Bonner, lawyer for Maurice H. Stans, objecting to remarks in the opening statement of Assistant United States Attorney James W. Rayhill.

Publicity about Watergate is expected to be the basis of a variety of pretrial motions by most if not all the defendants, in fact.

One possible motion is a request for dismissal of the charges on the ground that there has been so much publicity—some of it contributed to by the prosecution—that it is impossible to empanel an unbiased jury.

Courts generally reject such motions, however. Ways can be found to find an unprejudiced jury, they reason. Beyond that, they say, modern technology has made a certain amount of pretrial publicity inevitable in many cases, and the justice system must find some way of coping other than simply throwing the case out.

The defendants will thus probably have more luck if they merely ask, as some are expected to, that the trial be

held in some area other than the District of Columbia.

Options for Defendant

Even if they limit their motions to a request for a change of venue, of course, it is not at all clear that the court will consent. As one lawyer put it today, judges do not want to admit that they cannot find a fair jury.

Judge John J. Sirica officially assigned himself today as the judge in the case, and that move raised the possibility of yet another defense motion—a request that the judge disqualify himself on the ground that he has had much to do with the discovery that a cover-up took place.

If a defendant made such a motion and Judge Sirica refused, the defendant would then have two options—he could either appeal the matter, or he could “keep it in reserve,” as a lawyer said today, and use it as a ground for appeal should he eventually be convicted.

In addition to these motions, the defendants will certainly make formal requests for disclosure of prosecution evidence

—a procedure called “discovery” in which the prosecution will be required to make certain information available.

But, beyond that, it is conceivable that one or another of the defendants will seek to subpoena President Nixon, as John D. Ehrlichman, one of the defendants charged today, has already tried to do in his separate trial in California.

If the President refuses, lawyers here said today, the defendant could then argue that he was being denied his right under the Sixth Amendment to have “compulsory process for obtaining witnesses in his favor.”

It is likely that the various lawyers for the defendants will meet soon and cooperate to some extent in preparing for the trial, or at least in pretrial motions.

But it is doubtful that the seven defendants will present a common defense should they eventually be brought to trial together. Indeed, one reason behind that prosecution’s hope for a joint trial is undoubtedly the thought that the defendants might proceed on the principle of “every man for himself.”

May Start in Summer

The trial, assuming it will be joint, is not expected to begin before late summer at the earliest or, more likely, early fall. At that point, the defense counsel will, in addition to trying to discredit the prosecution witnesses, obviously seek to challenge the prosecution’s version of events. In some cases they will be unable to challenge the fact that a certain action was taken; in those cases they will challenge the prosecution’s version of the intent behind the action.

Prosecutors normally have something of an edge in a criminal prosecution, in part because they bring their case in the name of the Government and in part because the presumption of innocence is often given less weight than it deserves.

But in this case the defense lawyers have at least one advantage—they can concentrate on their case, whereas the prosecution, if it lives up to predictions, will be bringing a number of other cases as well—including, perhaps, one based on the cover-up of the cover-up, using evidence gathered from Watergate tape recordings.