Sirica Seeks 'Truth'

Defense Hits Bending of Rules

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The message was a bit redundant, but it was all the more emphatic for that.

"I'm not trying to try this case strictly according to

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the strict rules of evidence," said U.S. District Court Judge John J. Sirica. "What we're trying to get in this case is the truth of what happened."

Just in case anyone at the Watergate cover-up trial might not have been listening, the judge spelled it out. "T-R-U-T-H, truth, remember that word," he said, looking at the jurors now.

It is a single-minded objective that is still months away. Meanwhile, to hear defense lawyers tell it, the judge has thrown the rules of evidence out the window on more than one occasion.

The protests began with former White House counsel John W. Dean III's first day on the witness stand. He stayed nearly two weeks, but his seat was barely warm when he began testifying about a meeting he had with acting FBI Director L. Patrick Gray on June 22, 1972—just five days after discovery of the Watergate bugging and break-in.

Chief trial prosecutor James F. Neal wanted Dean to tell the jurors not only what Dean told Gray, but what Gray told him.

That might seem like a small point, but the ensuing hubbub went to the heart of the difficulties inherent in any conspiracy trial, especially one where "T-R-U-T-

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H" has been elevated above "the strict rules of evidence."

Judge Sirica's preferences along those lines are well known. But what is surprising is the avidity with which Watergate prosecutors have been encouraging them. The special prosecution force has always pretended to a punctilio that was supposed to distinghish it from its congressional counterparts. But now that the trial had started, the fastidiousness was fast disappearing.

Dean was about to answer, but the lawyer for former White House chief of staff H. R. Haldeman, John J. Wilson, got Sirica's attention first.

"Isn't this hearsay, your honor?" Wilson asked.

It was indeed. Simply put, the hearsay rule prohibits a witness from putting words in someone else's mouth. He can testify to what he, the witness, said, but not to what someone else told him. If what that "someone else" said is important, then that "someone else" should be called to the witness stand.

That rule, however, barely holds water at a conspiracy trial. In one of his final interviews as Watergate special prosecutor a few days ago—but well after the trial had started—Leon Jaworski was quoted as saying that unlike the Senate Watergate hearings, the record in Sircia's courtroom was being compiled under rules that largely exclude hearsay testimony.

That simply isn't so. As a practical matter, a witness can testify to what alleged conspirators allegedly said or did in furtherance of an alleged conspiracy even before it has been established that a conspiracy existed. Strictly speaking, independent evidence that there was a conspiracy is supposed to come first, but that isn't the way it works.

"In other words, the late Supreme Court Justice Robert M. Jackson wrote 25 years ago in a classic opinion, "a conspiracy is often proved by evidence that is admissible only upon the assumption that conspiracy existed.

The lawyers for the five defendants at the cover-up trial know all that. They also realized that they were in for a lot of hearsay, especially since the Watergate grand jury had named 19 unindicted co-conspirators, from former President Nixon on down.

But even at a conspiracy trial, the hearsay rule is not supposed to be a completely dead letter. What bothered the defense attorneys was the fact that Gray is not an alleged co-conspirator.

As a result, they argued, Dean, who has already confessed his guilt in the cover-up, could tell the jurors what he told Gray—but not what Gray told him.

Judge Sirica apparently agreed at a bench conference, but prosecutor Neal is a resourceful man.

"Did you impart to one of the defendants what Gray told you? he asked Dean.

Dean said he had done just that, relaying the information to former Attorney General John N. Mitchell, then still head of the Nixon re-election effort, about half an hour later on the evening of June 22. Here were two alleged co-conspirators talking to one another.

"All right, sir, Neal said in a Tennessee drawl tinged with satisfaction, "tell us what you told Mr. Mitchell as related to you by Mr. Gray.

Dean said he reported that the FBI was hot on the trail of the so-called "Dahlberg-Ogarrio checks," which had been contributed to the Nixon campaign and cashed by one of the Watergate burglars. Dean said he also told Mitchell—and later Haldeman—that Gray was inclined to believe the June 17, 1972 Watergate bugging and break-in had been "a CIA operation."

Score one for the prosecution. But it was only the beginning. Now Dean began testifying about subsequent conversations he had with Gray and CIA deputy director Vernon W. Walters, all hinging on efforts to get the CIA to block the Watergate investigation and to put up covert funds for the five burglars who had been arrested.

Walters has not been named an unindicted coconspirator either. But this time the prosecution didn't even bother with a preliminary showing that what he and Gray had told Dean had been "imported" to anyone.

Defense lawyers protested that this surely was imper-

missible hearsay. But Neal argued that all the conversations at issue had been "put in motion" by former White House aide John D. Ehrlichman, another defendant, who, Dean said, told him to contact Gray and Walters.

Admitted "against Haldeman," Sirica ruled of the new testimony until he was reminded of his mistake and then told the jurors he really meant Ehrlichman.

Former U.S. Attorney David G. Bress, another defense lawyer who teaches the law of evidence as a sideline, was incredulous.

"I've just heard a new theory of exception to the hearsay rule," he protested. "The set-in-motion theory. I've never seen it in any law books. There is no law to support it. It is a violation of the hearsay rule."

The judge didn't want to hear any more about it. "Let's proceed," he said.

Watergate prosecutors could have gotten the testimony into the record, without any objection, by waiting until Gray and Walters take the stand and speak for themselves. But that apparently didn't fit in with the prosecutors' game plan. Instead, the next morning, they submitted a legal memo to Sirica carrying it all a step further.

What Dean said Gray and Walters told him, the prosecutors suggested, ought not be considered as fact until Gray and Walters testify. But meanwhile, they argued, the jurors could mull over Dean's testimony as evidence "bearing on Mr. Dean's state of mind" and "the state of mind" of anyone to whom he might have relayed the information.

The judge approved and read it all out to the jurors. In effect, one defense lawyer later grumbled privately, Dean's account had been admitted against all five men on trial. Once again, Justice Jackson's analysis was proving prophetic.

At a conspiracy trial, he wrote, "the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which help to persuade the jury of existence of the conspiracy itself . . . The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction."

The prosecutors have other shortcuts in mind as well. These concern the 26 White House tapes they want to introduce at the trial although they have no government witness who participated in the conversations and who thus might be able to testify to the accuracy of the recordings. Mr. Nixon had been subpoenaed for that purpose, but he is ailing, and the prosecutors never really wanted to call him as a government witness anyway.

Instead, in a pre-trial memo, they had argued they could properly introduce the tapes, even without a first-hand witness, by showing the circumstances under which they were made, the method by which they were made, and their "chain of custody."

That, however, could be bothersome, sepecially since the prosecutors themselves had so sharply attacked the sloppiness of the Secret Service's records for the tapes at last year's hearings on the famous 18½-minute gap. The prosecutors suggested then, rather effectively, that there might have been other erasures on other tapes as well.

Now the shoe is on the other foot. Reminded of the pre-trial promises, Neal mimicked Ron Ziegler and said "the statements made in that memo are no longer operative." The prosecutors, it seems, have come across an appellate court decision that suggests to them that about all they have to do is show how the secret White House taping system was set up and then get former White House aide Alexander P. Butterfield to identify the voices.

Sirica, who had presided at the hearings on the 18½-minute gap, suggested that the prosecutors might also establish the chain of custody by what he now called the "very accurate log" the Secret Service kept.

Assistant special prosecutor Richard Ben-Veniste, who last year pointed out that the records were kept on scraps of leftover brown lunchbags, said laying that groundwork might take almost a week.

"We think we can shortcut it very properly," he said, citing a Fourth U.S. Circuit Court of Appeals decision that involved tapes seized by the FBI in a gambling raid. Ben-Veniste did not mention whether the gamblers had any time for erasures.

Whatever Sirica's ruling on that score, the cover-up trial is already starting to live up to Justice Jackson's formula for conspiracy cases:

"There generally will be evidence of wrongdoing by somebody. It is difficult for the individual (defendant) to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other."

At the Watergate cover-up trial, as Ehrlichman's lawyer, William Snow Frates, intoned the other day, "there is finger-pointing in this courtroom and there'll probably be more of it."

Frates, for one, has already accused Mr. Nixon of lying to Ehrlichman "to save his own neck" and has fired some salvos in Haldeman's direction. The defenses for Mitchell and his former deputy, Robert C. Mardian, lie in blaming it on the White House. And Kenneth Wells Parkinson, the low man on the totem pole, has protested that he was misled by Mitchell and Mardian.

It is far too early to guess what the jury's verdict might be, especially since there were more prospective jurors who thought it unfair to try the five men at all in light of the pardon for Mr. Nixon than there were people who said they had formed an opinion about the defendants' guilt or innocence.

Even so, it is no secret that before the trial started, at least some defense lawyers were already thinking past judgment day and pinning their hopes on the U.S. Court of Appeals. Haldeman's lawyer, Wilson, waggishly suggested the other day that Sirica was paving the way for them.

"I'll put that in my error bag," Wilson said of one of Sirica's rulings. "It's getting pretty full."

The judge was not impressed. "I dont keep one eye on the Court of Appeals," he told Wilson. "I do what I think is right."