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What the Watergate Trial Needs

THE HISTORY of the conduct of conspiracy trials in this country is not what you would call distinguished, and nothing has happened so far in the Watergate trial to suggest it will be an exception to the rule. Judge John Sirica has already been told by some of the lawyers that he doesn't know what he's doing and by some of his press critics that he is jeopardizing the fairness of this particular trial by using it as a vehicle to get at the full truth of Watergate. The judge, on the other hand, has told the lawyers that this case is going to be tried his way and, if they don't like it, that's too bad. He has told the jury the case isn't going to be tried according to the "strict rules of evidence." And he has ordered the lawyers not to talk to news reporters, apparently in an effort to shut off any criticism of his conduct as well as any discussion of future Watergate-related cases. None of that makes for a very seemly start to a long and complex trial that the public will have enough difficulty understanding as it is.

This kind of courtroom sideshow is not unusual in big conspiracy trials. They tend always to seem to be about to get out of control and often have turned into plain courtroom brawls. This is true largely because the conduct of a trial on a charge of, say, *conspiring* to obstruct justice is quite different from the conduct of a trial on the substantive charge of obstructing justice. By its nature, the crime of "conspiracy" is too vague to be defined precisely and the elements involved in it take on what Justice Robert H. Jackson once called "a special coloration" from the substantive crimes on which it rests. Since the rules of evidence which guide judges and lawyers as to what a jury may or may not hear were developed primarily in trials involving substantive crimes, many of them don't work—or don't work well—in conspiracy cases. For example, the kind of evidence that is relevant and admissible in a case involving a conspiracy to obstruct justice may be quite different from the kind that is relevant in a case involving a conspiracy to rob a bank. This leaves a large area for honest disagreement between the prosecution and the defense in any conspiracy trial. In many instances, that means any decision by the trial judge can be made to look completely wrong by one side or the other.

That's why we are not particularly disturbed right now by the controversial remarks Judge Sirica made during the first few days of the Watergate trial. Undoubtedly he has said some things he would have been better off not saying about the rules of evidence, the Court of Appeals, and what the defendants did or did not do. Whether he has already done anything (or will do anything) to bring about a reversal by the Court of Appeals if the jury returns a conviction is something neither he nor any of the lawyers participating in the case will know until that court finally rules. However, we cannot accept the view, expressed by some, that Judge Sirica has acted wtih a willingness to botch this case, if that is necessary, for the sake of exposing to public view the full story of Watergate. He knows better. Besides, his running commentary, his abrupt exchanges with lawyers and occasional outbursts of temper are not alien to his courtroom. In our judgment, in other words, he is not acting that way because this is the Watergate trial, but because he is Judge Sirica; this has been his mode of courtroom behavior for more than a decade.

What does disturb us right now is Judge Sirica's growing enthusiasm for secrecy. Early on in the Watergate investigation he ordered all the lawyers in the cases, defense as well as prosecution, not to talk in public about what was going on. That, it seems to us, was right both legally and as a matter of public policy. Then, however, he insisted upon selecting the jury for this particular trial in secret—something quite dubious as both a matter of law and a matter of policy. Now, apparently upset by recent statements by Mr. Jaworski about Watergate issues and by news accounts critical of his conduct of this trial, the judge has reminded the lawyers that his initial gag rule is still in effect. The legitimate basis for that rule was to reduce pre-trial publicity and thus to try to protect the defendants' rights to fair trials. Since the jury is now locked up, publicity cannot affect its deliberations, and the need for the rule, at least as far as talk about the case is concerned, is gone.

As the Watergate trial proceeds, the legal issues involving the calling of witnesses and the admissibility of testimony are likely to get more rather than less difficult. A witness who is regarded by at least one defendant as crucial (Mr. Nixon) may not be able to testify. The admissibility of some and perhaps many of the White House tape recordings will be seriously challenged. These and other questions, not to mention the meandering quality of the evidence characteristic of any conspiracy case, are going to make it hard for the public to follow the trial developments. Yet, this is a case in which the need for full public comprehension is vital. The public needs to come away from this trial with a feeling that everything pertinent to the case at hand has been told that could be told and that the verdict, whatever it may be, was reached fairly. That feeling can be created only if this trial is marked by more candor and less speculation than that which has marked its first few days. Judge Sirica can contribute to such an outcome by suppressing his urge for secrecy, by making sure that observers as well as the lawyers understand the issues and his answers to them, and by trying, anyway, to minimize the byplay of personalities and temperaments.