

# Efforts to Link Ehrlichman To Ellsberg Cover-Up Dropped

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The Watergate special prosecutor's office said yesterday it will cease trying to prove that former top White House aide John D. Ehrlichman was guilty of a conspiring to cover up the Ellsberg break-in.

The decision, announced two days before Ehrlichman's trial begins and apparently arrived at because of a variety of factors, could cause serious

legal problems for the prosecutor's office, several knowledgeable lawyers said. These sources predicted Ehrlichman's lawyers would fight the move.

The move by the prosecutor does not actually reduce the conspiracy charge against Ehrlichman, nor does it lessen the possible penalty if the former aide is convicted. It was seen by legal observers as pretrial strategy — a prosecution move to narrow the allegations of the conspiracy charge to facilitate proceeding with the trial without any further delay.

The change in the government's case against Ehrlichman was contained in the prosecutor's response to a subpoena issued by Ehrlichman's attorneys for notes Ehrlichman took of 10 White House conversations he had with

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President Nixon and that he says are essential for his defense.

"Although we believe there is sufficient direct evidence to prove the concealment purpose beyond a reasonable doubt . . . in the interests of judicial economy and fairness to the defendant, the government is electing not to advance at trial the conspiratorial concealment theory," the prosecution legal brief said.

The indictment against Ehrlichman and three others charges them with conspiring to violate the civil rights of Dr. Lewis Fielding, who was Pentagon Papers codefendant Daniel Ellsberg's psychiatrist, by breaking into his Beverly Hills, Calif., office and also that "they would thereafter conceal such activities."

Ehrlichman's subpoena mainly asks for his notes of

conversations with the President during the alleged concealment phase. Ehrlichman's attorneys have said Ehrlichman undertook to hide for national security reasons and at the order of the President the break-in and other activities of the White House plumbers unit.

If the prosecutors remove the cover-up allegations, the subpoenas probably would become moot and delay would be avoided.

In effect, the prosecutor wants to change the wording of the indictment to take one element out of the conspiracy charge. Several legal observers said that might necessitate bringing a new indictment altogether if the prosecutor cannot get Ehrlichman's attorneys to agree to the change.

Ehrlichman's attorneys are prohibited by court order from discussing the case. Persons familiar with the Ehrlichman defense in particular and conspiracy cases in general said that "it would be unlikely that any lawyer would waive his client's constitutional right to having a charge drawn by a grand jury" once a case has progressed as far as this one.

"All the good motives in the world do not negate the intent to deprive Dr. Fielding of his Fourth Amendment rights," the prosecutors said. They said the issue of allegedly hiding the burglary is "essentially collateral to the far more serious question of the unlawful entry into Dr. Fielding's office."

"Furthermore, it appears that to pursue this phase of

the conspiracy might necessitate time-consuming litigation on the eve of trial concerning the production of presumptively privileged documents."

The White House has turned over the subpoenaed notes to U.S. District Judge Gerhard A. Gesell for his determination whether they are relevant to Ehrlichman's defense under an untried arrangement as to who will have the final word over their being used at trial. The President has maintained that he will make that final determination; Gesell has said that the court must make that decision.

By removing the concealment aspect of the charge, the prosecutors also might thwart the latest effort of Ehrlichman's attorneys to make national security an issue in the trial.

Prosecutors said in their legal brief that they still would present much of the same evidence against Ehrlichman although they have changed their approach to the case.

Instead of showing that his alleged attempts to hide the break-in was a part of the conspiracy, however, they said they would attempt to prove that his later actions would show his "consciousness of guilt" over the original conspiracy to break into the offices.

Since they are not pressing forward on the concealment aspect, the case would be narrowed down to the break-in planning of which the prosecutors claim Ehrlichman was a part.

The new approach by the special prosecutor's office is the latest in a series of complex pretrial legal moves as the various sides in the case maneuver for their best trial position. The central issue in most of these moves has been the production of documents held by the White House, an issue that already has prompted court hearings that could have ended with the President being held in contempt of court but that resulted in an unsteady truce.

Ehrlichman's attorneys are expected to oppose the prosecution move for several reasons, among them:

- The remaining subpoenaed White House documents deal almost completely with the concealment phase. Taking away that phase of the charges substantially limits the defense arguments on the issue of White House production of documents.

- In virtually all criminal cases, it is to the advantage of the prosecution to narrowly define the charge against a defendant.

Several prosecution and defense attorneys familiar with Watergate cases and other prosecutions said yesterday that the change of strategy by prosecutors this close to a trial date was unusual.

One, who asked not to be identified because of his closeness to the investigations, said that the backing off of one element of the charge left the special prosecutor's office open to criticism that they "overcharged" Ehrlichman in the first place.

"His defense lawyers are going to scream that the prosecutors threw in everything but

the kitchen sink to make the case look stronger," the same attorney said. Ehrlichman also is charged with four counts of lying to U.S. investigators probing the Ellsberg break-in.

Judge Gesell, to whom the Ellsberg case is assigned, has not scheduled any hearings on the subpoena. There were indications that he may proceed with jury selection on Wednesday and sequester the panel before holding such a hearing in an effort to lessen pretrial publicity.