Watergate Inquiry Raising Issue Of How Publicity Affects Trials

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WASHINGTON, July 22—Has former Attorney General John N. Mitchell been deprived of his right to a fair trial on conspiracy charges because the Senate Watergate committee questioned him sharply about related political matters for two days over national television?

On this question hinges the fate not only of Mr. Mitchell and a co-defendant former Secretary of Commerce Maurice H. Stans, but also of a score of other one-time White House and Administration leaders who have become widely known as Watergate witnesses and face possible criminal charges.

Also at stake, at longer range, is the issue of whether Congress can continue to conduct widely publicized free-wheeling inquiries like the current one without running the risk of insulating from punishment the very men whose wrongdoing it is attempting to expose.

Ultimately involved as well will be the capacity of the courts to adapt trial procedures realistically to the kind of publicity that the modern national communications system generates, or, alternatively, to impose curbs on that system.

Underlying Problem

The underlying problem is the difficulty of reconciling the First Amendment's guarantee of freedom of the press, as it applies to coverage of crime, and the Sixth Amendment's guarantee of speedy trial by an impartial jury in the locality where the crime was committed.

When the press freedom permits national telecasting of hearings in which interrogating Senators are not bound by any rules of evidence or limits on prejudicial questioning, critics declare, the problem of finding an impartial jury to try one of the hearing witnesses or someone he accused becomes far more difficult than it ordinarily would be.

Mr. Mitchell and Mr. Stans, relying on this argument, have asked a Federal district judge in New York to dismiss the case against them, which involves an alleged conspiracy to obtain a $200,000 campaign contribution from Robert L. Vesco, a financier then under Government investigation.

If the judge will not dismiss the charges, the two former Cabinet officers have said, he should at least delay the trial indefinitely, presumably until the Watergate publicity has subsided, and move it to a court outside New York.

The question, as it affects the former Nixon aides, should be decided initially in a matter of weeks. Judge Lee P. Gagliardi has ordered the Vesco prosecutors to reply to the Mitchell-Stans argument by the end of July, and the case is scheduled to go to trial Sept. 11.

If Mr. Mitchell and Mr. Stans lose their request for a dismissal, a postponement and a change of trial site, they could well carry an appeal based on the constitutional issue all the way to the Supreme Court, which has never ruled on exactly this kind of situation.

In 1951, the high court reversed one conviction of four Florida blacks charged with raping a white girl on the ground that hostile local press coverage of the case before the trial has created an atmosphere in which impartial judgment was impossible and thus denied the defendants due process of law.

In 1965, in a case with some implications for the current Watergate hearings, the Court ruled 5 to 4 that televising a pretrial hearing and part of the trial of Billy Sol Estes, the Texas swindler, over the defendant's objections had infringed on his right to a fair trial.

Federal rules of practice prohibit any televising or radio broadcast of trial proceedings, so the Estes case would not be directly applicable to any Watergate defendants, but the Court's adverse comments on the effect of televised pretrial hearings on potential jurors could be regarded as influential.

The leading case, decided in 1966, involved Dr. Samuel H. Sheppard, whose conviction 10 years before for the murder of his wife was reversed by the Supreme Court on the ground that the trial court had not protected the Cleveland osteopath from the adverse effect of massive prejudicial publicity.

Writing for the eight-justice majority, Associate Justice Tom C. Clark referred to the "carnival atmosphere" at the trial. Attorney for Mr. Mitchell and Mr. Stans based their motion for dismissal in part on "the carnival atmosphere of Watergate precipitated as it has been by the Senate hearings and the grand jury leaks."

'Strong Measures'

In his decision Justice Clark wrote: "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused.

"Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial," Mr. Clark continued, "the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity."

After the Supreme Court decision, Dr. Sheppard was retried and acquitted.

Most Similar Case

The only case that comes close to the Watergate context never reached the Supreme Court. In 1952, fter his indictment on income tax violations, Denis W. Delaney was a witness at House hearings that received extensive news coverage.

The United States Court of Appeals for the First Circuit reversed his subsequent conviction on the ground that the publicity had "pretty thoroughly blackened and discredited" his reputation, so much so that the judge should have postponed the trial to let the publicity die down.

If that ruling involved the potential influence of newspaper and radio accounts of a Washington Congressional hearing on Boston jurors, what would the same court say today about the impact of proceedings televised live and in full throughout the country and rebroadcast in evening prime time on educational channels in major cities?

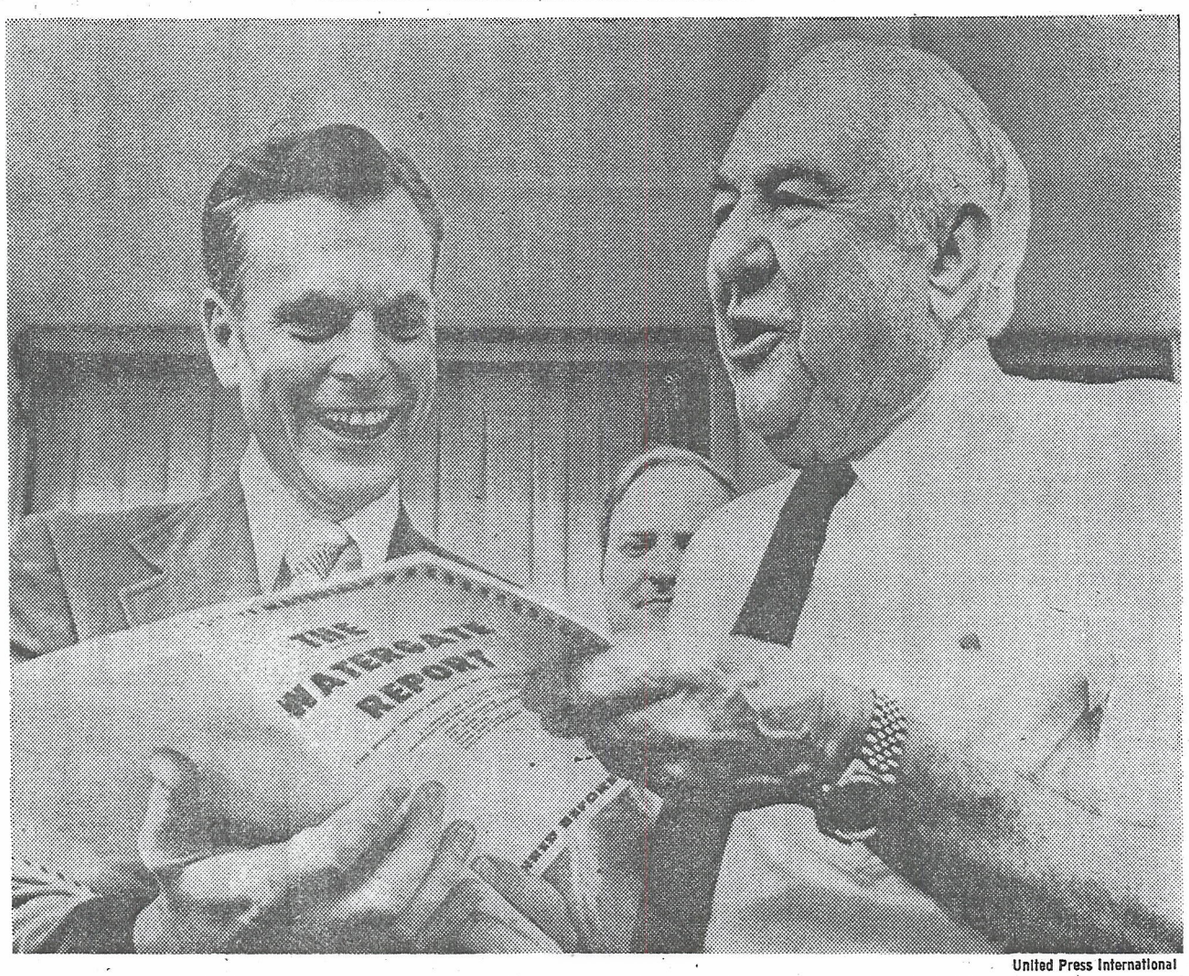
Available Procedures

These court decisions give lawyers today some guidance on whether a client can get his conviction reversed on appeal, but they are not particularly helpful to judges, such as Judge Gagliardi, who must rule on such questions before trial and then attempt to conduct proceedings that will not invite reversal.

Some of the judicial procedures available include, as Justice Clark indicated, transferring the case to a court outside the area of immediate publicity, postponing trial until other developments have captured the attention of news media and permitting more extensive interrogation and rejection of potential jurors in an effort to get an unprejudiced panel.

In addition, during the trial itself, the judge can instruct the jury to avoid reading or watching current news accounts and sequester them in a hotel if he feels the threat of outside influence is too great.

When information that is not part of the trial record gets into the press, the judge can attempt to shut if off by orders to the prosecution and



United Press International

Senator Sam J. Ervin Jr., right, enjoying a laugh after being asked to autograph a book titled "The Watergate Report" by a fellow Democrat, Jeff Wells of Fuquay Springs, N.C. The book was blank.

defense attorneys or, if need by, even to reporters and editors.

Difference in High Court

Some attorneys believe that the present Supreme Court, heavily influenced if not always dominated by President Nixon's four appointees, would not be as solicitous of a criminal defendant, whether convicted or indicted, as the Warren Court was of Dr. Sheppard.

Senator William B. Saxbe, Republican of Ohio, who defended the Shepard conviction before the Court as Attorney General of Ohio, has told friends he believes the dedication of Chief Justice Warren E. Burger and his colleagues to strong law enforcement would tend to moderate the Court's past distate for prejudicial pretrial publicity.

On the other hand, the Burger Court has not demonstrated in its decisions on obscenity or newsmen's privilege of confidentiality, to list two, any inclination to expand the boundaries of the First Amendment when freedom of the press tends to conflict with other constitutional rights.